No. 05-834

In The
Supreme Court of the United States

JESSICA WILLIAMS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A.

Whether Petitioner Williams' federal habeas corpus petition should have been reviewed under 28 U.S.C. § 2241 not 28 U.S.C. § 2254.

B.

Whether the Double Jeopardy Clause prohibits two verdicts for the same identical offense.

C.

Whether the Double Jeopardy Clause is triggered when a defendant has been acquitted, *which acquittal became final* yet is convicted of the same identical offense in the same trial.

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PETITION FOR WRIT OF CERTIORARI

JESSICA WILLIAMS (Jessica) respectfully prays that a Writ of Certiorari issue to review and reverse the six (6) state DUI convictions under NRS 484.3795 on the grounds that the Fifth Amendment Double Jeopardy Clause gives affect to an acquittal which has become final when a defendant has been acquitted and convicted of the same identical offense in the same trial. Also, review is necessary because the federal courts considered Jessica's habeas corpus petition as one under 28 U.S.C. § 2254 rather than 28 U.S.C. § 2241.

OPINIONS BELOW

1. The United States Court of Appeals for the Ninth Circuit. Appendix (App.) 1-12.
2. Federal District Court. App. 13-31.
3. The Nevada Supreme Court. App. 32-62.
4. State District Court Post Conviction Order. App. 63-67.

JURISDICTION

The date of the United States Court of Appeals for the Ninth Circuit Opinion was September 7, 2005. App. 1.

The date of the United States Court of Appeals for the Ninth Circuit denial of Jessica's petition for rehearing was October 14, 2005. App. 72.

The instant Petition for Writ of Certiorari is timely under United States Supreme Court Rule 13(1).

The instant Petition for Writ of Certiorari is filed under United States Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED IN THIS CASE

NRS 484.379 This Statute is incorporated in the App. 73-75.

NRS 484.3795 This Statute is incorporated in the App. 75-77.

STATEMENT OF THE CASE

Petitioner Jessica Williams (hereinafter "Jessica") was charged by the State with six (6) counts of felony Driving Under the Influence of drugs.[1] NRS 484.379 and NRS 484.3795 are Nevada's DUI statutes. App. 73-77. The allowable unit of prosecution under NRS 484.3795 is a *single* offense of Driving Under the Influence. App. 4-5. The *single* offense of DUI has been divided into several "discrete basis of liability."[2] *See* NRS 484.3795(1)(d) and (f). Nevada case law holds that NRS 484.3795(1)(d) and (f) are separate theories proving one *single* offense under NRS 484.3795.

At the close of the evidence, the trial judge erroneously divided each single DUI offense into two offenses and instructed the jury to return verdicts on each. The jury was allowed to return twelve verdicts for six (6) DUI offenses. App. 3. When the jury returned verdicts based on NRS 484.3795(1)(d), Jessica was acquitted of NRS

[1] The incident occurred on March 19, 2000 when Jessica was twenty (20) years old.

[2] This Court in *Sanabria, infra,* refers to alternative means or theories of prosecution as "discrete basis of liability." *See Id.* at 72.

484.3795.[3] When the jury returned verdicts based on NRS 484.3795(1)(f), Jessica was found guilty of NRS 484.3795.[4] The trial judge accepted the acquittals as valid and lawful verdicts of the jury.[5] Upon the district court's acceptance, the acquittals become final. *See* NRS 175.541. Jessica had been acquitted and convicted of the same identical offenses in a single trial. Since Jessica had been acquitted of the six (6) NRS 484.3795 DUI offenses, she challenged the six (6) NRS 484.3795 DUI convictions (the same identical offenses) as being violative of the Fifth Amendment Double Jeopardy Clause.

Jessica raised her constitutional double jeopardy claim on appeal to the Nevada Supreme Court. App. 52-55. The court denied relief by applying *Blockburger v. United States*[6] to the alternative theories of prosecution. App. 52-54. This was plain error. The *Blockburger* analysis applies to separate offenses not to alternative theories of a single offense. *Sanabria v. United States* at *fn. 24.*[7] *See also United States v. Keen.*[8] The Nevada Supreme Court's

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[3] The Nevada Supreme Court held that Jessica was acquitted of NRS 484.3795. "The jury returned not guilty verdicts on the six counts of driving while under the influence. . . . " App. 39. The federal district court and the 9th Circuit acknowledged the acquittals. App. 15; App. 3.

[4] Jessica was sentenced to a minimum of eighteen (18) years and a maximum of forty-eight (48) years. Jessica must serve at least eighteen (18) years before being eligible for parole.

[5] *Smith* said "Double-jeopardy principles have never been thought to bar the *immediate repair* of a genuine error in the announcement of an acquittal, even one rendered by a jury." *Id.* at 11. (emphasis added.) Here, neither the trial judge nor the prosecution objected to the acquittals.

[6] 284 U.S. 299, 52 S. Ct. 180 (1932).

[7] 437 U.S. 54, 95 S. Ct. 2170 (1978).

[8] 104 F.3d 1111 (9th Cir. 1996).

reliance on *Blockburger* to defeat Jessica's double jeopardy claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " 28 U.S.C. § 2254(d).[9]

In addition, the state high court said, "Further, we concluded that Williams' argument also lacks merit because she has been subjected to only one prosecution and one punishment for each DUI charge." *Williams* at 550.[10] Contrary to the Nevada Supreme Court's holding, this Court in *Smith v. Massachusetts, infra,* made clear that all double jeopardy protections are triggered in a single trial. Jessica filed a Writ of Certiorari in this Court which was denied on November 18, 2002, one issue being her double jeopardy claim.

A federal habeas corpus petition was filed in district court on July 25, 2003 challenging the State DUI convictions on double jeopardy grounds. Jessica's request for relief was denied by Order dated March 1, 2004. App. 13-31. The basis for denial of the double jeopardy claim was that "protection against twice being punished" is the only double jeopardy safeguard in a single prosecution.

> The Double Jeopardy Clause provides three basic protections. First, it protects against a *subsequent* prosecution for the same offense after an acquittal. Second, it protects against a *subsequent* prosecution for the same offense *after* a

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[9] Jessica's federal habeas corpus filing was correctly a 28 U.S.C. § 2241 petition and should have been reviewed on a lesser standard than 28 U.S.C. § 2254. *See* Argument I, *infra.* However, Jessica's claim meets both standards.

[10] *Williams v. State,* 118 Nev. 536, 50 P.3d 1116 (2002). App. 55. The court provided no authority for its position.

> conviction. And, third, it protects against multiple *punishments* for the same offense when the legislature did not intend multiple punishments. . . . **when a defendant is prosecuted on multiple charges at the the same time in a single prosecution,** *the first two protections against successive prosecution are not implicated, such that only the third protection is at issue.*

App. 27 (cite omitted) (italics original and bold added.)

Jessica filed an appeal to the United States Court of Appeals for the Ninth Circuit (hereinafter "9th Circuit").

The 9th Circuit denied Jessica's double jeopardy claim on the same basis used by the district court.

> The Nevada Supreme Court correctly relied upon *United States v. Halper*, 490 U.S. 435, 440 (1989), *abrogated on other grounds by Hudson v. United States,* 522 U.S. 93, 96 (1997), when it noted, "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Williams*, 50 P.3d at 1124 (internal citation and quotation marks omitted). Williams would like to carve out a fourth abuse against which double jeopardy ostensibly protects: the simultaneous conviction and acquittal of the same offense, under different theories, in the same trial by a single jury. Such an extension would not comport

with the primary purpose of the Double Jeopardy Clause.[11]

App. 9.

Jessica filed the instant Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FAILED TO CONSIDER *STOW V. MURASHIGE*, 389 F.3D 880 (9TH CIR. 2004) AND AS A RESULT REVIEWED JESSICA'S DOUBLE JEOPARDY CLAIM UNDER THE WRONG (HIGHER) STANDARD

a. The conflict within the Ninth Circuit as to which standard of review applies, 28 U.S.C. § 2241 or 28 U.S.C. § 2254, presents an important federal question which should be reviewed by this Court under Rule 10(c).

In *Stow*, a jury returned a verdict of guilty on the charge of attempted first-degree murder. The jury also returned not guilty verdicts on the two counts of attempted second-degree murder. On direct appeal, the Hawaii Supreme Court reversed the jury's judgment of conviction of attempted first-degree murder. Stow was no

[11] The 9th Circuit, district court, and the state high court ignored the finality of the acquittals returned by the jury. In *Christ v. Bretz, infra*, the Court said that the primary purpose of the Double Jeopardy Clause is "to preserve the finality of judgments." 437 U.S. 28, 33, 989 S. Ct. 2156, 2159 (1978).

longer in custody pursuant to a state court judgment. Although Stow remained in custody after the court reversed his conviction, Stow's status was that of a pretrial detainee as he was in custody pending his retrial on the counts of attempted second-degree murder. On remand by the Hawaii Supreme Court, prior to the retrial, Stow pursuant to 28 U.S.C. § 2254 sought federal habeas relief on the ground that a retrial on the charges of attempted second degree murder would violate his Fifth Amendment Right against double jeopardy. Even though Stow had mistakenly labeled his habeas petition as a 28 U.S.C. § 2254 filing, the 9th Circuit held, "*The Proper Jurisdictional Basis for Stow's Habeas Petition Was 28 U.S.C. § 2241, Not 28 U.S.C. § 2254.*" *Id.* at 885. (emphasis original.) *Stow* reasoned,

> Preliminarily, we held that Stow's habeas petition is properly considered under 28 U.S.C. § 2241, not § 2254, because at the time Stow filed his petition he was not "in custody pursuant to the judgment of a State Court." Thus, to obtain habeas relief, Stow need only show that a retrial would violate his right against double jeopardy. We need not consider whether the Hawaii Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d)(1)."

Id. at 882-883.

Stow explained the impact of hearing a petition under 28 U.S.C. § 2241. "As a result, in reviewing Stow's petition we do not apply heightened standards imposed by The Antiterrorism and Effective Death Penalty Act of 1996 contained in 28 U.S.C. § 2254." *Id.* at 886. Jessica's custody status at the time she filed her habeas petition, was

identical to Stow's. At the time Jessica filed her double jeopardy habeas corpus petition, the state district court had vacated the judgment of convictions under NRS 484.3795 following Jessica's petition for post conviction relief. App. 63-67. As in *Stow*, Jessica's custody status at the time she filed her federal habeas corpus petition was that of a pretrial detainee.[12] Jessica was not in custody pursuant to a state court judgment; she remained in pretrial custody because she could not make bail.

Jessica's Counsel provided the 9th Circuit with *Stow* as a supplemental authority pursuant to the Federal Rules of Appellate Procedure (FRAP) Rule 28(j) one month before oral argument. Counsel for Jessica also referred to the significant impact of *Stow* during oral argument. Even though 28 U.S.C. § 2241 was the correct standard of review, the 9th Circuit decided Jessica's habeas petition under 28 U.S.C. § 2254. The 9th Circuit's ignoring of *Stow* was plain error.

Jessica requests that this Court grant Certiorari and review her double jeopardy claim under the standard set forth under 28 U.S.C. § 2241. Alternatively, Jessica requests a remand to the United States Court of Appeals for the Ninth Circuit for review of her claim of double jeopardy under the correct standard of 28 U.S.C. § 2241.

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[12] Jessica, as Stow, mistakenly labeled her habeas petition as 28 U.S.C. § 2254 which was filed July 25, 2003. The Nevada Supreme Court reversed the post conviction Order on July 24, 2004. *State v. Williams*, 120 Nev. Adv. Op. No. 52 (2004).

II.

THE DOUBLE JEOPARDY CLAUSE PROHIBITS TWO VERDICTS FOR THE SAME IDENTICAL OFFENSE

a. This issue is an important question of federal law and of first impression that this Court should review under Rule 10(c).

Reason and law tell us that it is constitutionally impermissible to allow two verdicts for the same identical offense to stand; one must go. If this were not true, a person charged with one offense could face three possibilities: (1) acquitted twice; (2) convicted twice; or (3) acquitted and convicted. Consequences must necessarily flow from verdicts: freedom for acquittal and punishment for conviction. Under the first possibility, no harm is done the defendant even though it is nonsensical to say he was freed twice. The second and third possibilities are different. If twice convicted with both verdicts deemed lawful, the defendant receives punishment twice. But, the Double Jeopardy Clause protects against twice being punished for the same offense, thus the second possibility cannot lawfully occur. If the third possibility were allowed to occur, the defendant goes free by the acquittal but goes to jail for the conviction. Such a result would be ludicrous. Freedom and incarceration are not only contradictions, they are mutually exclusive.

Historically, the Double Jeopardy Clause protects acquittals even when erroneously rendered. However, in the instant case, the acquittal was ignored and made a nullity. A reversal on appeal by the prosecution would have rendered the same result Under the Double Jeopardy Clause, when an acquittal which has been final and a conviction are simultaneously returned on the same

identical offense, the acquittal, to have affect, must trump the conviction.

III.

ACQUITTALS WHICH HAVE BECOME FINAL ARE PROTECTED UNDER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE

a. Jessica Williams presents an important federal question in double jeopardy jurisprudence, clarifying the gap between *Sanabria, infra*, and *Smith, infra*, and should be reviewed by this Court under Rule 10(c).

The State prosecuted Jessica under NRS 484.3795 alleging two discrete bases of liability, NRS 484.3795(1)(d) and (f) respectively. When the jury returned verdicts based on NRS 484.3795(1)(d), Jessica was acquitted of NRS 484.3795. When the jury returned verdicts based on NRS 484.3795(1)(f), Jessica was found guilty of NRS 484.3795. Jessica has been acquitted and convicted of the same identical offense in a single trial. The lower reviewing courts ignored the acquittals rendering them a nullity. Acquittals are protected under the Fifth Amendment Double Jeopardy Clause.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Constitution, Fifth Amendment. The Double Jeopardy Clause has application to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056 (1969); *Illinois v. Vitale,* 447 U.S. 410, 415, 100 S. Ct. 2260, 2264 (1980). The primary purpose of the Double Jeopardy Clause is "to preserve the finality of judgments," *Christ v. Bretz,* 437 U.S., at 33, 98 S. Ct. at

2159, as well as the "integrity" of judgments, *United States v. Scott,* 437 U.S. 82, 92, 98 S. Ct. 2187, 2194 (1978). Jessica's acquittal of NRS 484.3795, which had become final, terminated the criminal prosecution as to that charge and the finding of guilt on the same offense is barred by the Fifth Amendment Double Jeopardy Clause. See *Sanabria v. United States,* 437 U.S. 54, 98 S. Ct. 2170, 57 L.Ed.2d 43 (1978); *United States v. Scott,* 437 U.S. 82 (1978); and *Ball v. United States,* 163 U.S. 662, 16 S. Ct. 1192, 41 L.Ed. 300 (1896). As this Court in *Scott, supra,* said " . . . the law attaches particular significance to an acquittal." *Id.* at 91.

An acquittal is historically one of the most respected and powerful legal principles used by juries in American criminal jurisprudence. This Court has always constitutionally protected an acquittal. An acquittal cannot be lawfully reviewed even when "based upon an egregiously erroneous foundation." *Fong Foo v. United States,* 369 U.S. 141, 143, 82 S. Ct. 671, 672 (1962). An acquittal when final is given immediate affect. *Smith v. Massachusetts,* slip opin. No. 03-8661, 543 U.S. ___ (2005) ("But any contention that the Double Jeopardy Clause must itself (even absent provision by the State) leave open a way of correcting legal errors is at odds with the well established rule that the bar will attach to a pre-verdict acquittal that is patently wrong in law.") *Id.* at 10. (cites omitted); NRS 175.481 ("It [the verdict] shall be returned by the jury to the judge in open court."); NRS 175.541 ("If judgment of acquittal be given on a verdict. . . . he must be discharged as soon as the verdict is given.") The prosecution is constitutionally prohibited from appealing an acquittal. *United States v. Wilson,* 420 U.S. 332, 352, 95 S. Ct. 1013, 1026 (1975). However, this body of constitutional law regarding acquittals has been blatantly ignored in the instant case. The lower courts here have held that an acquittal does not

receive double jeopardy protection. This is a case of first impression in this Court.[13] Holding that the Double Jeopardy Clause is not triggered, when simultaneous verdicts of acquittal which had become final and conviction are returned on the same identical offenses, **is tantamount to allowing the state to appeal a verdict of acquittal and always win.**

Here, the acquittals have been rendered a nullity, of no legal affect, as if reversed on appeal. Yet every court in which Jessica has been heard has admitted her acquittals. "The jury returned not guilty verdicts on the six counts of driving under the influence. . . . " App. 39. "On all six counts, the jury returned six verdicts of not guilty of driving under the influence of a controlled substance. . . . " App. 15. "The jury found Williams . . . not guilty under the impairment theory." App. 3. The Double Jeopardy Clause does not allow any court to ignore the elephant (acquittal) in the room. Reasonable minds and logic dictate that an acquittal cannot be constitutionally ignored. *Sanabria* supports Jessica's double jeopardy claim.

Sanabria held that if a defendant is acquitted of the offense based on one of the several "discrete bases of liability," it is an acquittal of the offense. "That the trial court disregarded the Government's allegation of numbers betting does not render its acquittal on the horse betting theory any less an acquittal on the 'offense' charged." *Id.*

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[13] *Williams* was a case of first impression in Nevada, *cf. Peck v. State*, 116 Nev. 840, 7 P.3d 470 (Nev. 2000) (Jury foreman signing verdict forms finding Peck "both guilty and not guilty of Count 1, Sexual Assault" is not an acquittal because "the verdict was not accepted by the district Court. . . . ") *id.* at 474, 475. Unlike *Peck*, the verdict of acquittal was accepted and made final by the district court in Jessica's case.

at 72. Equally true, Jessica's acquittal on the impairment theory is no less an acquittal of NRS 484.3795, the offense charged. *Sanabria* stated, "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single *crime* into a series of . . . 'discrete bases of liability.'" While the rationale of *Sanabria* favors Jessica, Jessica's case is factually different. Unlike *Sanabria,* Jessica was acquitted and convicted of the same identical offense in the same trial.

The 9th Circuit held that double jeopardy protections do not apply in a single trial. **Herein lies the gap in double jeopardy jurisprudence.** It was opined that unless and until the state initiates a second prosecution, double jeopardy safeguards are not available. Jessica's double jeopardy claim was denied on this erroneous basis. This Court has recently held that double jeopardy protections do apply in a single trial. In *Smith v. Massachusetts,* slip opin. No. 03-8661, 543 U.S. ___ (2005), Justice Scalia delivered the opinion of the Court holding that the trial judge had acquitted Smith therefore the finding of guilt by the jury on the same identical offense in a single trial violated the Double Jeopardy Clause. *Smith* clearly shows that all double jeopardy protections apply in a single trial. Smith was charged with three separate offenses. At the close of the government's case-in-chief, the trial judge acquitted Smith on one of the charges based on insufficiency of the evidence. At the end of the defense case, the trial judge changed her mind and vacated the previous acquittal. All three charges were submitted to the jury whereupon Smith was found guilty of all three offenses. The Appeals Court of Massachusetts held that the double jeopardy clause was not implicated because the trial

judge's correction of her ruling had not subjected petitioner to a *second prosecution or proceeding.* (This is the government's argument in Jessica's case). The Supreme Judicial Court of Massachusetts denied further appellate review. This Court granted certiorari and reversed.

Since Smith was acquitted, the jury's finding of guilt on the same identical offense in a single trial violated the Double Jeopardy Clause. Timing of the verdicts is irrelevant. *Smith* said, "double jeopardy analysis focuses on the individual 'offense' charged." *U.S. Const. Amdt. 5. . . . " Id.* at fn3. *Smith* refutes the government's argument that a second prosecution or further fact-finding is required before double jeopardy attaches. *Smith* supports Jessica's claim that an acquittal which has become final and conviction on the self-same offense violates the Double Jeopardy Clause. The United States Court of Appeals for the Ninth Circuit refused to address *Smith.* This was plain error. The instant Writ of Certiorari should be granted. **To do otherwise, an acquittal which became final means nothing.**

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jessica Williams, *Petitioner-Appellant,* v. Warden, for the State of Nevada Women's Correctional Facility, Christine Bodo, et al., *Respondent-Appellee.*	No. 04-15465 D.C. No. CV-03-0874-PMP OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
February 15, 2005 – San Francisco, California

Filed September 7, 2005

Before: Dorothy W. Nelson, William A. Fletcher, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge D. W. Nelson

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OPINION

D. W. NELSON, Circuit Judge:

Jessica Williams appeals the district court's denial of her habeas corpus petition. The district court concluded that the Nevada Supreme Court's rejection of Williams' double jeopardy claim neither contravened nor unreasonably applied clearly established federal law, as determined by the United States Supreme Court. At issue in this appeal is Williams' asserted simultaneous conviction and acquittal, under two separate theories, for violating the single offense of "Driving Under the Influence of Intoxicating Liquor or Controlled or Prohibited Substance" ("DUI"), pursuant to Nev. Rev. Stat. § 484.3795(1) (hereinafter NRS 484.3795(1)). Williams argues that because she was charged under two subsections of the statute and the trial court treated the alternate bases of criminal liability as separate offenses by having the jury return verdicts on each theory, her acquittal under one theory barred conviction under the other. We find this argument without merit and affirm the district court's denial of the petition.

I. Factual and Procedural Background

On March 19, 2000, Williams' van veered off the road and onto a highway median, killing six teenagers who had been assigned to a road cleanup crew by Clark County Juvenile Services. Williams, who was twenty years old at the time, testified that she had been up all night prior to the tragic incident. She admitted that she had smoked marijuana about two hours before the accident and that she had used the drug "ecstasy" the previous evening. Williams' car drifted onto the median after she had apparently fallen asleep at the wheel. At the time of the accident, Williams

had a pipe with marijuana residue and a plastic bag with marijuana in her car. Blood tests confirmed the presence of marijuana metabolites in her system.

Williams was charged, *inter alia*, with six counts of violating NRS 484.3795(1) for driving under the influence of a controlled substance and proximately causing the deaths of six persons. The six counts charged her under two subsections of NRS 484.3795(1). Under subsection (1)(d), in order to convict Williams, the jury needed to find her "under the influence of a controlled substance. . . ." NRS 484.3795(1)(d). Under subsection (1)(f), which creates a per se violation of the statute, in order to convict, the jury needed to find that Williams had "a prohibited substance in [her] blood or urine in an amount equal to or greater than" the statutory threshold. NRS 484.3795(1)(f). The jury convicted Williams on all six counts under the per se theory.

The verdict forms were organized by victim and provided for a verdict on each of the charged alternative bases for criminal liability. Specifically, the state district court used a dual-verdict form, which provided boxes for the jury to check corresponding to guilty and not guilty verdicts for each theory of the crime. Thus, on each of the six DUI counts, the jury rendered a verdict for each theory of culpability. The jury found Williams guilty of violating NRS 484.3795(1) as to each of the victims under the per se theory of subsection (1)(f) and not guilty as to each of the victims under the "under the influence" theory (hereinafter "impairment theory") of subsection (1)(d).

After exhausting her appeals in state court, Williams filed a petition for habeas corpus in federal district court,

claiming that her convictions violated the Fifth Amendment's Double Jeopardy Clause. *See* U.S. Const. amend. V. The district court denied her petition, and Williams timely filed this appeal.

II. Standard of Review

This court reviews the district court's denial of a 28 U.S.C. § 2254 habeas petition de novo. *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petition stemming from a state court conviction will not be granted unless the decision is "contrary to" or "an unreasonable application of" established Supreme Court precedent. 28 U.S.C. § 2254(d).[1] The federal court must look to the decision of the highest state court to address the merits of the petitioner's claim in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n. 7 (9th Cir. 2000).

III. Discussion

A. The Nevada Supreme Court's Construction of the Statute of Conviction

The Nevada Supreme Court concluded that the DUI statute under which Williams was charged defines alternative means of committing a single offense and not separate offenses. *Williams v. Nevada*, 118 Nev. 536, 50 P.3d 1116, 1125 (Nev. 2002) ("We conclude that NRS 484.3795(1)(d) and (f) constitute alternative means of

[1] AEDPA applies in this case because Williams filed her petition after the effective date of the act.

committing an offense. . . .").[2] While the court made a legal determination that the two subsections define alternate bases of a single form of criminal liability, it also made a factual determination that Williams was acquitted under one subsection of the statute and convicted under another because, as Williams argued to the Nevada Supreme Court, "the [state] district court treated the alternative theories as separate offenses by asking the jury to return verdicts as to each theory. . . ." *Id.* at 1124; *see also id.* at 1119 ("Williams was convicted by a jury of six counts of driving with a prohibited substance in the blood or urine. . . . The jury returned not guilty verdicts on the six counts of driving while under the influence. . . .").

We note that it would have been perfectly reasonable for the Nevada Supreme Court simply to read the "acquittals" on the impairment theory of DUI from the alternative verdict forms as either themselves special verdicts or as answers to a general verdict form with interrogatories. *Cf.* Nev. R. Civ. P. 49 (explaining the propriety of the use of special verdicts and general verdicts accompanied by answers to interrogatories in the context of civil trials); *see also Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003) (explaining that "[i]f the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict

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[2] The Nevada Supreme Court similarly concluded in another case involving a related DUI statute "'that the [L]egislature intended the subsections of [the DUI] statute to define alternative means of committing a single offense, not separable offenses permitting a conviction of multiple counts based on a single act.'" *Williams*, 50 P.3d at 1125 (alterations in original) (quoting *Dossey v. State*, 964 P.2d 782, 785 (Nev. 1998)).

with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict."). Read this way, the forms simply ask the jury to explain which theory of culpability underlies its single verdict. Under such a reading, there would be no cognizable double jeopardy violation because there would be only one finding of guilt or innocence.[3] Williams concedes as much.

We may not, however, substitute our judgment that the alternative verdict forms are better viewed as akin to special verdict forms or a general verdict form requesting answers to interrogatories. How to view these forms is a question of fact for the state courts to resolve in the first instance. Under AEDPA, this court owes a state court's findings of fact great deference. 28 U.S.C. § 2254(e)(1). We must presume the correctness of the state court's factual findings absent clear and convincing evidence to the contrary. *Id.*; *see also Davis v. Woodford*, 384 F.3d 628, 637-38 (9th Cir. 2004) (applying the standards of 28 U.S.C. § 2254). We thus proceed, as the Nevada Supreme Court did, under the assumption that Williams was *convicted* under NRS 484.3795(1)(f) (the per se subsection) and

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[3] *Williams* cites a Hawaii Supreme Court case for its holding that a DUI statute specifying both a per se theory and an impairment theory of criminal liability for DUI "provides two alternative means of proving a single offense." 50 P.3d at 1124 n.48 (quoting *State v. Dow*, 806 P.2d 402, 405 (Haw. 1991)). In that case, the Hawaii Supreme Court treated the trial court's prior "acquittal" on the impairment *theory* alone as a factual finding akin to a jury's special verdict. *Dow*, 806 P.2d at 406. The Hawaii Supreme Court thus did not consider the trial court's entry of judgment of acquittal on that theory as a jeopardy terminating event and held that the defendant's subsequent conviction for the *offense* under a per se theory of DUI did not constitute double jeopardy. *Id.* at 406-07.

acquitted under NRS 484.3795(1)(d) (the impairment subsection) for purposes of our analysis of the double jeopardy question. *See Williams,* 50 P.3d at 1125 ("We conclude that . . . appellant's *acquittal* under the one subsection and her *conviction* under the other does not violate the Double Jeopardy Clause.") (emphasis added).

The Nevada Supreme Court indicated that even if the two subsections had created two offenses under Nevada law, there would still be no double jeopardy violation. The court explained that "[u]nder the *Blockburger* test, each of these subsections defines a separate offense for purposes of double jeopardy analysis." *Id.* at 1124 (citing *Blockburger v. United States,* 284 U.S. 299 (1932)). Under *Blockburger,* "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [for double jeopardy purposes] is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304. With its application of *Blockburger,* the Nevada Supreme Court made clear that even if the two subsections of Nevada's DUI statute are treated as creating facially distinct offenses, they are separate offenses for double jeopardy purposes because they fail *Blockburger's* "same evidence" test. *See Sanabria v. United States,* 437 U.S. 54, 70 n.24 (1978) (characterizing the *Blockburger* test as the "same evidence" test).

Williams thus faces the following dilemma. Either the two subsections create two distinct offenses under Nevada law or they do not. If the two subsections create two offenses, then there is no double jeopardy violation because the two offenses fail the same evidence test of *Blockburger* and thus are not the same offense for purposes of double

jeopardy. *See Williams,* 50 P.3d at 1124. If, on the other hand, the trial court mistakenly allowed, whether wittingly or not, Williams to be simultaneously acquitted and convicted of the same offense under two subsections of the statute, then, as we explain *infra,* there is still no double jeopardy violation. Either way, Williams' double jeopardy challenge fails. Because the Nevada Supreme Court specifically held that the two subsections of the DUI statute do not create separate offenses, we turn our attention away from the court's *Blockburger* analysis to the second horn of the dilemma.

We pause to note, however, that even if, as Williams claims, the Nevada Supreme Court erred in finding that *Blockburger* was "the appropriate tool" for its double jeopardy analysis, *Williams,* 50 P.3d at 1124, this error would not be enough to grant her habeas petition. The application of federal law must be "objectively unreasonable," not just "incorrect or erroneous." *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003). And it is the state court's decision, not its reasoning, that is judged under the "unreasonable application" standard. *See, e.g., Hernandez v. Small,* 282 F.3d 1132, 1140 (9th Cir. 2002) (observing that in habeas proceedings, "we are determining the reasonableness of the state courts' 'decision,' not grading their papers") (citing *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001)); *id.* ("the intricacies of the state court's analysis need not concern us; what matters is whether the *decision* the court reached was contrary to controlling federal law"). Because the Nevada Supreme Court reached the correct result on other grounds that neither contravened nor unreasonably applied established federal law, this court, under AEDPA, must uphold the Nevada Supreme Court's decision.

B. Williams' Reliance on Supreme Court Precedent in Defining the Scope of Double Jeopardy's Protections

The Nevada Supreme Court correctly relied upon *United States v. Halper,* 490 U.S. 435, 440 (1989), *abrogated on other grounds by Hudson v. United States,* 522 U.S. 93, 96 (1997), when it noted, "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Williams,* 50 P.3d at 1124 (internal citation and quotation marks omitted). Williams would like to carve out a fourth abuse against which double jeopardy ostensibly protects: the simultaneous conviction and acquittal of the same offense, under different theories, in the same trial by a single jury. Such an extension would not comport with the primary purpose of the Double Jeopardy Clause. *See Green v. United States,* 355 U.S. 184, 187 (1957) ("The underlying idea [behind the constitutional prohibition against double jeopardy] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .").

Furthermore, because the acquittal took place at the same time as the conviction, Williams never had a legitimate expectation of finality in the verdict of acquittal. *See United States v. DiFrancesco,* 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight. The constitutional protection against double jeopardy unequivocally prohibits a *second trial* following an acquittal, for the

public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be *retried* even though the acquittal was based upon an egregiously erroneous foundation.") (emphasis added) (internal quotation marks omitted) (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

Williams relies heavily on *Sanabria* for the proposition that a single offense cannot be divided into "discrete bases of liability" under different theories and counted as separate offenses for purposes of double jeopardy. *See Sanabria*, 437 U.S. at 72. Williams claims that the Nevada Supreme Court has done what *Sanabria* has expressly forbidden by treating NRS 484.3795 subsections (1)(d) and (1)(f) as separate offenses for purposes of its double jeopardy analysis.

The *Sanabria* Court held that Sanabria's acquittal of the charge of being connected with an illegal gambling business on one theory "stands as an absolute bar to any *further* prosecution for participation in that business" on any other theory. *Sanabria*, 437 U.S. at 72-73 (emphasis added). *Sanabria* thus protects Williams from further prosecution on the same offense under a different theory, but it does not apply in this case, where the two theories of culpability were presented to the same jury simultaneously.

Williams also claims that the protections of collateral estoppel embodied in the Double Jeopardy Clause demand that her "acquittals" under subsection (1)(d) prevent the government from "relitigating . . . a second time under an alternative theory." *See Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (holding that collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy).

Williams is correct. This is in fact what *Sanabria* proscribes. *See* 437 U.S. at 69. But that is not what happened here. There was one trial at which the jury rendered its verdicts simultaneously. The government litigated the case once – not twice – under alternative theories, as is its right. *See Schad v. Arizona,* 501 U.S. 624, 631 (1991) ("It may be alleged in a single count that . . . the defendant committed the offense . . . by one or more specified means.") (internal citation and quotations omitted). Williams' simultaneous acquittals and convictions thus did not violate the principle of collateral estoppel embodied in the Double Jeopardy Clause. *See Ashe,* 397 U.S. at 442 (defining collateral estoppel as "the principle that bars *relitigation* between the same parties of issues actually determined at a *previous* trial") (emphasis added).

Williams does not provide any authority for the proposition that a simultaneous conviction and acquittal on the self-same offense violates the Double Jeopardy Clause. United States Supreme Court precedent in fact supports the opposite contention. In *Green,* the Court held that Green's conviction on the lesser included offense of second degree murder constituted an "implicit acquittal" of the greater murder charge. *Green,* 355 U.S. at 190 & n.10. The Court held that for double jeopardy purposes the jury should be understood to have "returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'" *Id.* at 191. In so doing, the Court sanctioned a simultaneous acquittal and conviction on the "same offense." *See Brown v. Ohio,* 432 U.S. 161, 166 & n.6 (1977) (holding that greater and lesser included offenses were the "same offense" for purposes of double jeopardy).

The Nevada Supreme Court neither contravened nor unreasonably applied established federal law when it refused to expand the protections of double jeopardy to Williams' case. Moreover, doing so would have thwarted the obvious intent of the jury, and "no possible unfairness can be found in a judgment that reflects the jury's true intent." *United States v. Stauffer,* 922 F.2d 508, 514 (9th Cir. 1990) (holding that the trial court's correction of verdict from acquittal to guilty in order to correct a clerical error made by the jury did not violate Double Jeopardy Clause).

IV. Conclusion

Because the Nevada Supreme Court's decision was consistent with clearly established federal law in holding that Williams has not twice been put in jeopardy for the same offense, we affirm the district court's denial of Williams' petition for habeas corpus.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JESSICA WILLIAMS, Petitioner, v. THE WARDEN FOR THE STATE OF NEVADA, SOUTHERN NEVADA WOMEN'S CORRECTIONAL FACILITY, CHRISTINE BOBO, et al., Respondents.	CV-S-03-0874-PMP (LRL) ORDER (Filed Mar. 2, 2004)

Before the Court fur consideration is the Petition of Jessica Williams for Habeas Corpus under 28 U.S.C. § 2254, and for Stay of State Proceedings (#1) filed July 25, 2003. By her Petition, Williams alleges that her conviction on six counts of driving with a prohibited substance in her blood violated the Double Jeopardy Clause because the jury simultaneously acquitted her of driving under the influence of a controlled substance or intoxicating liquor as an alternative basis for culpability under the relevant statute, Nev. Rev. Stat. 484.3795. The issues raised in the Petition have been fully briefed and the arguments of counsel were presented at the hearing conducted on February 24, 2004.

Background

This case arises from the tragic deaths of six teenagers assigned to a road cleanup crew who were struck and killed when the vehicle Petitioner Williams was driving veered off the road after Williams had apparently fallen asleep. Trial testimony reflected that Williams had been up all night the evening prior to the incident. Williams admitted that she had smoked marijuana approximately two hours before the incident and that she had used the drug "ecstacy [sic]" the prior evening. She had a pipe with marijuana residue and a plastic bag with marijuana in her vehicle at the time of the accident. Blood tests taken returned positive results for the presence of the active ingredient of marijuana and a metabolite thereof.

Williams was charged with, *inter alia*, six counts of violating N.R.S. 484.3795, which provides in pertinent part:

> 1. A person who:
>
> . . . .
>
> (d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;
>
> . . . . ; or
>
> (f) Has a prohibited substance in his blood or urine in an amount equal to or greater than the amount set forth in subsection 3 of N.R.S. 484.379,
>
> and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if

> the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony . . . .

N.R.S. 484.3795(1)(d) & (f).[1]

The six counts charging Williams with violating this statute charged her with driving under the influence of a controlled substance, a violation of N.R.S. 484.3795(1)(d), and/or driving with a prohibited substance in her blood, a violation of N.R.S. 484.3795(1)(f).

The verdict forms given by the trial court to the jury provided for a verdict on each one of the two charged alternative bases for culpability, That is, on each count, the verdict forms provided for a verdict on the charge that Williams had been driving under the influence of a controlled substance in violation of N.R.S. 484.3795(1)(d), and on each count, the verdict forms provided for a verdict on the alternative charge that Williams had been driving with a prohibited substance in her blood in violation of N.R.S. 484.3795(1)(f). Under the jury charge and closing arguments, the jury could find petitioner guilty or not guilty on either one or both bases, with one verdict not controlling the other.

On all six counts, the jury returned six verdicts of not guilty of driving under the influence of a controlled substance in violation of N.R.S. 484.3795(1)(d) and six verdicts of guilty of driving with a prohibited substance in her blood in violation of N.R.S. 484.3795(1)(f).

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[1] The specifics of the listing in N.R.S. 484.379(3) are not material to the issues on this petition.

Williams appealed the convictions to the Supreme Court of Nevada. She contended, *inter alia*, that the six convictions for driving with a prohibited substance in her blood in violation of N.R.S. 484.3795(1)(f) violated the Double Jeopardy Clause because she was acquitted of the same charges when the jury acquitted her of driving under the influence of a controlled substance in violation of N.R.S. 484.3795(1)(d).

The Supreme Court of Nevada affirmed Williams' conviction. *Williams v. State*, 50 P.3d 1116 (Nev. 2002), *cert. denied*, 537 U.S. 1031, 123 S.Ct. 569, 154 L.Ed.2d 446 (2002).[2] On the double jeopardy issue, the state high court first stated that the *Blockburger*[3] test was the appropriate tool and, under that test, the two alternatives were separate offenses for purposes of double jeopardy analysis. 50 P.3d at 1124. The Nevada Supreme Court next noted that, in its jurisprudence concerning offense redundancy, it had previously held in a case involving a statute similar to N.R.S. 484.3795, that the Nevada legislature intended for the subsections of the statute to define alternative means of committing a single offense. Accordingly, only one conviction on multiple alternatives arising from a single act was permitted. *Id.*, at 1125-26, The court then stated that the State of Nevada therefore had properly alleged the two alternative theories in one count under state procedure, and it concluded with the following:

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[2] The Supreme Court of Nevada issued its decision on August 2, 2002; and the United States Supreme Court denied certiorari on November 18, 2002. Timeliness of the present petition, filed on July 25, 2003, under the one year limitations period in 28 U.S.C. 2244(d)(1) is therefore not at issue.

[3] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 78 L.Ed. 306 (1932).

> We conclude that NRS 484.3795(1)(d) and (f) constitute alternative means of committing an offense and that appellant's acquittal under the one subsection and her conviction under the other does not violate the Double Jeopardy Clause. Further, we conclude that Williams' argument also lacks merit because she has been subjected to only one prosecution and one punishment for each DUI charge.

50 P.3d at 1125.

Prior to the filing of the present federal petition, the state district court vacated the conviction and ordered a new trial on the six counts. The state trial court's action was not based upon double jeopardy grounds. The State has appealed the state district court's ruling to the Supreme Court of Nevada, where it is pending decision.

In her federal habeas petition, Williams contends in principal part that the Supreme Court of Nevada erroneously relied upon the *Blockburger* analysis because the situation presented is controlled by the standards and holding in *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), Williams maintains that, under *Sanabria*, alternative theories of the same offense are treated as a single offense for double jeopardy purposes. She continues that *Sanabria* thus holds that an acquittal on one alternative theory constitutes an acquittal on the entire offense and therefore bars a conviction based on the other alternative.

Standard of Review

The parties agree that the standard of review in the Antiterrorism and Effective Death Penalty Act (AEDPA)

governs. Under that standard, a federal court may grant habeas relief for legal error on a claim adjudicated on the merits by the state courts only if that adjudication resulted in a state court decision that was either contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. *E.g.*, 28 U.S.C. § 2254(d)(1); *Mitchell v. Esparza*, 124 S.Ct. 7,10 (2003).

On the first alternative of this test, a state court's decision is "contrary to" law clearly established by the Supreme Court only if it applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell*, *supra*. A state court decision is not contrary to established federal law merely because it does not cite the Supreme Court's opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware of its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.* Moreover, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Mitchell*, 124 S.Ct. at 11. Ultimately, a decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

On the second "unreasonable application" alternative, the petitioner must demonstrate that the state court's application of Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *E.g.*, *Mitchell*, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003).

The petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to habeas relief. *Davis*, 333 F.3d at 991.

Discussion

Abstention and Case or Controversy Concerns

At the outset, the Court notes that it both raised the issue with counsel and independently examined whether it is appropriate for this Court to proceed in the unusual procedural posture presented following upon the vacatur of the judgment of conviction and the still-pending proceedings regarding retrial in the state court. Neither party maintains that a stay is required in this circumstance. Moreover, Ninth Circuit law confirms that federal abstention is not required under the *Younger*[4] doctrine in the face of pending state criminal proceedings leading to a second trial when double jeopardy is the basis for federal relief. *See Mannes v. Gillespie*, 967 F.2d 1310, 1312-13 (9th Cir. 1992). *Younger* abstention is not required in this context because the protection afforded by the Double Jeopardy Clause "'is not [only] against being twice punished, but against being twice put in jeopardy.'" *Mannes*, 967 F.2d at 1312, *quoting United States v. Ball*, 163 U.S. 662 (1896). Habeas review thus is appropriate despite the ongoing state criminal proceedings where, as here, state judicial remedies on the double jeopardy claim have been exhausted. *Mannes*, *supra*.

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[4] Under *Younger v. Harris*, 401 U.S. 37 (1871), and its progeny, a federal district court generally may not interfere with pending state criminal proceedings due to comity and federalism concerns.

Additionally, this Court is presented with a continuing and ripe controversy without regard to the possible outcomes on the state court appeal. If this federal court were to hold that double jeopardy bars a conviction under the driving with a prohibited substance alternative under N.R.S. 484.3795(1)(f), such a holding both would preclude the new trial ordered on that charge as well as bar continued custody under the prior judgment of conviction if it were reinstated on the state court appeal, The issue before this Court, therefore, cuts across all issues and outcomes in the state court proceedings and is not dependent in any sense upon the resolution of the distinct issues that are currently before the Nevada Supreme Court. Accordingly, the Court concludes that abstention is not required by the considerations of comity and federalism embodied in the *Younger* doctrine and further that a ripe case or controversy is presented.

Doable Jeopardy

Was the State Court Decision Contrary to Clearly Established Federal Law?

The Court is not persuaded that the decision of the Nevada Supreme Court in *Williams*, *supra*, was contrary to clearly established federal law as reflected in the Supreme Court's *Sanabria* decision.

In *Sanabria*, multiple defendants were charged in a single-count indictment with violating 18 U.S.C. § 1955. This statute makes it a federal offense to conduct an "illegal gambling business," which is defined in part as a gambling business that operates in violation of the law of the state where it is located. The indictment alleged that the gambling business in question operated in violation of

state law by taking both parimutuel numbers bets and horse racing wagers that were illegal under a specified Massachusetts statute. After the defense rested, the trial court struck the numbers betting evidence on the ground that only horse betting was illegal under the Massachusetts provision cited in the indictment, with numbers betting being prohibited instead only under a different state law. The trial court then granted a judgment of acquittal as to Sanabria on the ground – as later construed by the Supreme Court – that there was "insufficient proof of an element of the crime . . . that he was 'connected with' the single gambling business."[6] Moreover, "[t]he judgment of acquittal was entered on the entire count and found [Sanabria] not guilty of the crime of violating 18 U.S.C. § 1955 . . . without specifying that it did so only with respect to one theory of liability." 437 U.S. at 66-67, 98 S.Ct. at 2180. Based upon this construction of the judgment of acquittal, the Supreme Court concluded that the petitioner could not be retried based on the numbers

[6] 437 U.S. at 72, 98 S.Ct. at 2183. This construction of the ground for acquittal in Justice Marshall's opinion was a debatable one. The evidence apparently tended to show that Sanabria had been involved only with the numbers betting side of the business rather than the horse betting side. The district court stated in granting a judgment of acquittal that Sanabria had to be "connected with this operation, and by that I mean a horse operation." 437 U.S. at 59, 98 S.Ct. at 2176. The basis for acquittal therefore could be quite credibly argued to be not that Sanabria had no connection to the business at all but rather that he had no connection to the aspect of the business – horse betting – as to which the trial judge was allowing the prosecution to proceed. *Cf.* 437 U.S. at 81, 98 S.Ct. at 2157 (Blackmun, J., dissenting) ("it appears to me that petitioner has succeeded in having the indictment read one way in the trial court, and another way here, as the situation required.").

betting evidence following upon an appellate reversal of the exclusion of that evidence.

In so concluding, the high court responded as follows to a Government contention that horse betting and numbers betting theories could have been alleged in alternative multiple counts:

> While recognizing that only a single violation of the statute is alleged under either theory, the Government nevertheless contends that separate counts would have been proper, and that an acquittal of petitioner on a horse-betting count would not bar another prosecution on a numbers count. . . . *Although there may be circumstances in which this is true*, petitioner *here* was acquitted *for insufficient proof of an element of the crime which both such counts would share* – that he was "connected with" the single gambling business. . . . *This finding of fact* stands as an absolute bar to any further prosecution for participation in that business.
>
> The Government *having charged only a single gambling business*, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on *retrials* for the "same offense."
>
> . . . .
>
> The Double Jeopardy Clause is no less offended because the Government here *seeks to try petitioner twice* for this single offense, instead of seeking to punish him twice as it did in *Braverman*. "If two offenses are the same . . . for purposes of barring consecutive sentences at a

> single trial, they necessarily will be the same for purposes of barring *successive* prosecutions.". . . .
>
> Accordingly, even if the numbers allegation were "dismissed," [rather than concluded by an acquittal] we conclude that a *subsequent* trial of petitioner for conducting the same illegal gambling business as that at issue in the first trial would subject him to a *second* trial on the "same offense" of which he was acquitted.

437 U.S. at 72-74, 98 S.Ct. at 2183-84 (emphasis added; citations and footnotes omitted).

The foregoing description of *Sanabria* provides only a pertinent overview of a Supreme Court decision that was issued against the backdrop of a procedurally intricate and highly fact-specific setting.[6] The *Williams* case is simply not comparable to *Sanabria*.

First, *Sanabria* did not involve, as this case involves, the simultaneous presentation of alternative grounds for culpability in the same verdict at the same time to a jury. *Sanabria* instead involved a question of whether the defendant could be subjected, *after* a judgment of acquittal argued to be grounded only on one alternative theory, to a *subsequent* trial for the same offense on another theory.

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[6] Justice Blackmun opened his dissent with the following observation:

> This case, of course, is an odd and an unusual one, factually and procedurally. Because it is, the case will afford little guidance as precedent in the Court's continuing struggle to create order and understanding out of the confusion of the lengthening list of its decisions on the Double Jeopardy Clause.

437 U.S. at 80, 98 S.Ct. at 2187.

Although, as *Sanabria* suggests, charges perhaps may be the "same offense" regardless of whether presented in the same trial or in successive proceedings, the difference between asserting charges in one trial or in successive trials is quite material in determining what type of protection the Double Jeopardy Clause then provides. When multiple bases of culpability for the same offense are presented simultaneously in one trial, double jeopardy protects only against multiple punishments for the one offense rather than against varying – or even directly inconsistent – verdicts on the multiple theories. *See infra*, at 11-12.

Further, *Sanabria* involved, as this case does *not* involve, an "acquittal . . . entered on the entire count, without specifying that it did so only with respect to one theory of liability." 437 U.S. at 66-67, 98 S.Ct. at 2180. In stark – and material – contrast, the entire *raison d'être* of the alternative verdict forms presented to the jury in this case was to obtain distinct verdicts on each theory that pertained specifically to each respective theory. Unlike *Sanabria*, there thus is no verdict in this case that unqualifiedly acquitted Williams of violating N.R.S. 484.3795 without being restricted to only one theory of liability.

Finally, *Sanabria* involved, as this case clearly does *not*, an acquittal expressly based upon there being insufficient proof of an element of the crime that both alternative theories shared. In *Sanabria*, an acquittal based upon there being no connection between the defendant and the gambling business thereafter necessarily foreclosed a subsequent prosecution of defendant for conducting the gambling business, without regard to whether the gambling business was involved in numbers betting as well as horse betting. In *Williams*, by contrast, the basis for the

acquitted charge, "driving under the influence," is not a shared element under the alternative theories in N.R.S. 484.3795(1)(d) and (f).[7]

Sanabria – an anomalous case from the very beginning – is thus distinguishable from the present case in a number of respects that are fundamental in applying both the case and the Double Jeopardy Clause. The Court therefore rejects Williams' argument that the decision by the Nevada Supreme Court in this case either contradicts governing law as set forth in *Sanabria* or confronts a set of facts that are materially indistinguishable from *Sanabria* and nonetheless arrives at a different result. The Court

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[7] Petitioner's argument to the contrary on this subsidiary point is not persuasive. Relying on the "driving under the influence" reference in the caption to the statute, petitioner maintains that driving under the influence thus is a common element under both subparagraphs (d) and (f) of N.R.S. 484.3795. The plain text of the statute, however, reflects that driving under the influence is an element only on the alternative basis for culpability in subparagraph (d). Subparagraph (f) instead premises liability, in the disjunctive, on there being a prohibited substance in the blood or urine in an amount in excess of a statutorily-listed amount. And the statute has been so construed by the Supreme Court of Nevada. *E.g.*, *Williams*, *supra*. Any shorthand references to alternative subparagraph (f) charges as "DUI" charges are simply that, *i.e.* shorthand but not technically accurate references. Driving under the influence clearly is not an element common to the two alternative theories.

The Court reiterates, as discussed in greater depth *infra*, that it does not appear that the Double Jeopardy Clause bars even inconsistent verdicts on multiple theories presented simultaneously to a jury in one trial. *Sanabria*, again, involved a successive prosecution after an acquittal. However, the absence of an explicit resolution of a common element shared between the alternative theories is yet another substantial feature distinguishing the instant case from *Sanabria*.

accordingly holds that the decision of the Nevada Supreme Court is not contrary to clearly established federal law.[8]

Alternatively, Was the State Court Decision an Objectively Unreasonable Application of Clearly Established Federal Law?

On the other possible ground for federal habeas relief under the AEDPA based on alleged legal error, the petitioner must demonstrate that the state court's application of Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *E.g.*, *Mitchell*, 124 S.Ct. at 12; *Davis*, 333 F. 3d at 990. The

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[8] Petitioner has pointed out numerous times in the briefing and argument that the Supreme Court of Nevada did not discuss or even cite *Sanabria* in its discussion. However, a state court decision is not contrary to established federal law merely because it does not cite the Supreme Court's opinions. *E.g.*, *Mitchell, supra.* The state high court may have declined to discuss petitioner's reliance upon *Sanabria* simply because the case is inapposite.

To the further extent that petitioner contends that the state high court's decision is contrary to circuit level authority, her burden of course is to show that the state court's decision is contrary to Supreme Court authority. In any event, the Nevada Supreme Court's decision did not contradict governing law as set forth in the cited decisions or confront a set of facts that was materially indistinguishable from circuit precedent and nonetheless arrived at a different result. Petitioner relies in particular upon *United States v. Keen*, 104 F.3d 1111 (9th Cir. 1997), and *United States v. Johnson*, 130 F.3d 1420 (10th Cir. 1997). However, both of these decisions involved the question of whether multiple punishments could be imposed on the related offenses charged rather than with the issue presented in this case of whether a simultaneous acquittal on one alternative requires that a simultaneous guilty verdict on another alternative be overturned on double jeopardy grounds. Thus, even if circuit case law were the appropriate indicium under the AEDPA, which it is not, it does not appear that petitioner would be able to establish that the decision of the Supreme Court of Nevada was contrary to clearly established circuit level case law.

question before this Court therefore is not whether, *arguendo*, the state court incorrectly referred to the *Blockburger* test in the course of its analysis,[9] or even was incorrect in its decision as a whole, but rather is whether its disposition of the double jeopardy issue was not only incorrect but an "objectively unreasonable" application of Supreme Court precedent. Petitioner has not carried her burden in the present case under this standard.

The Double Jeopardy Clause provides three basic protections. First, it protects against a *subsequent* prosecution for the same offense *after* an acquittal. Second, it protects against a *subsequent* prosecution for the same offense *after* a conviction. And, third, it protects against multiple *punishments* for the same offense when the legislature did not intend multiple punishments. *E.g.*, *Jones v. Thomas*, 491 U.S. 376, 380-82, 109 S.Ct. 2522, 2525-26, 105 L.Ed.2d 322 (1989); *Ohio v. Johnson*, 467 U.S. 493, 497-500, 104 S.Ct. 2536, 2540-41, 81 L.Ed.2d 425 (1984). When a defendant is prosecuted on multiple charges at the same time in a single prosecution, the first two protections against successive prosecution are not implicated, such that only the third protection is at issue. *See Jones v. Thomas*, 491 U.S. at 381, 109 S.Ct. at 2525; *see also Ohio v. Johnson*, *supra*. And, in that third context, "'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the Legislature intended.'" *E.g.*, *Jones v. Thomas*,

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[9] *But cf. United States v. Karlic*, 997 F.2d 564, 570-71 (9th Cir. 1993) (applying *Blockburger* text to charges under two distinct provisions of a single statute, quoting language from *Blockburger* that the same evidence test applies "where the same act or transaction constitutes a violation of two distinct statutory *provisions*") (emphasis added).

491 U.S. at 381-82, 109 S.Ct. at 2525-26, *quoting Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983). Consequently, the Supreme Court has stated that "where the State has made no effort to prosecute the charges *seriatum*, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Johnson*, 467 U.S. at 500 n.9, 104 S.Ct. at 2541 n.9.[10]

Substantial and long-established lower federal court authority accordingly supports the conclusion that there is no Constitutional prohibition under the Double Jeopardy Clause against varying – or even directly inconsistent – verdicts in a single simultaneous prosecution brought on multiple charges or theories of culpability. *See, e.g., United*

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[10] This statement in *Johnson* undercuts petitioner's alternative subsidiary argument – raised for the first time in her traverse – that collateral estoppel bars a conviction under subparagraph (f) due to the acquittal under subparagraph (d). *See also United States v. Powell*, 469 U.S. 57, 88, 105 S.Ct. 471, 478, 83 L.Ed.2d 481 (1984) ("The problem is that the same jury reached inconsistent results; once that is established principals of collateral estoppel – which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict – are no longer useful."). Moreover, as noted *supra*, the two subparagraphs in any event do not share a common element of "driving under the influence" upon which to premise collateral estoppel even if the doctrine otherwise were available within the context of a simultaneous single prosecution. *Cf. Ashe v. Swanson*, 397 U.S. 436, 444, 50 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (criminal collateral estoppel must be applied with "realism and rationality," and the court must scrutinize the verdict to see whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration by the verdict). The Court expresses no opinion as to whether the collateral estoppel argument constitutes a distinct claim for purposes of exhaustion and/or whether the issue was property exhausted. The Court instead simply rejects the argument on the merits under the AEDPA standard. *See* 28 U.S.C. § 2254(b)(2) (unexhausted claim may be denied on the merits).

States v. Chilingirian, 280 F.3d 704, 708, 710-11 & 712-13 (6th Cir. 2002); *Nesbitt v. Hopkins*, 86 F.3d 118, 120-22 (8th Cir. 1996); *Ross v. United States*, 197 F.2d 660, 662-63 (6th Cir. 1952) (collecting earlier cases); *see also United States v. Klein*, 247 F.2d 908, 919 (2d Cir. 1957).[11]

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[11] *Cf. Price v. Vincent*, ___ U.S. ___, 123 S.Ct. 1848, 1854 & n.2, 155 L.Ed.2d 877 (2003) (considering lower federal court authority in accord with state court decision as support for conclusion that state court was not objectively unreasonable in its application of Supreme Court double jeopardy precedent).

Petitioner relies upon *Price v. Vincent* and a number of federal and state authorities as support for the proposition that double jeopardy protection applies in single trials. However, the cases, including *Vincent* itself, typically involved the question of whether the prosecution could engage in continued, *i.e.*, successive or subsequent, prosecution of a charge within a single prosecution, or, in petitioner's counsel's terms, within a "single trial," following a prior nonsimultaneous acquittal or claimed acquittal *earlier in the proceeding*. *See, e.g., Vincent supra* (question of whether statements by state district court in response to motion for a directed verdict constituted an acquittal of first degree murder and thereby precluded continued prosecution on that charge rather than second degree murder); *United States v. Blount*, 34 F.3d 865 (9th Cir. 1994) (trial court could not reinstate tree spiking counts as misdemeanor charges in ongoing prosecution one day after it granted motion for acquittal on felony tree spiking charges). The salient point of these cases – which has no application here – is that the prosecution may not engage in subsequent prosecution of the same charge after an acquittal even within the context of the same trial or proceeding. The point has no application to this proceeding because this is not a case where the defendant was prosecuted on the same charge subsequent to an acquittal, whether subsequently in the same trial or proceeding or subsequently in a later trial or proceeding.

Petitioner's "single trial" argument again begs the question of what protection the Double Jeopardy Clause provides in a single trial involving simultaneous verdicts. As the Supreme Court authorities cited previously in the text confirm, double jeopardy protects in the context of non serial verdicts in a single trial only against multiple punishments for a single offense that are not intended by the legislature. None of petitioner's remaining authorities are directly apposite to

(Continued on following page)

Indeed, the principle has long been established in Supreme Court precedent that the presence of simultaneous inconsistent verdicts by a single jury does not give rise to a constitutional violation. The principle was so well established that a unanimous Court in *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), approached the matter only as a matter of supervisory authority and proceeded from the premise that neither *res judicata* nor collateral estoppel nor any Constitutional protection precluded inconsistent verdicts rendered by a single jury. 469 U.S. at 64 & 65, 105 S.Ct. at 466 & 477.

Against the backdrop of this long-established precedent, the Court holds that the Nevada Supreme Court's rejection of petitioner's double jeopardy defense to her conviction under N.R.S. 484.3795(1)(f) did not constitute

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the case at hand. That is, petitioner does not cite a single case involving simultaneous verdicts of acquittal and conviction on alternative bases for culpability where a conviction on one alternative was set aside under the Double Jeopardy Clause because of a simultaneous acquittal on the other alternative. For example, petitioner cites to *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943). In *Bradley*, the defendant was sentenced to a fine and imprisonment under a law that allowed only a sentence of fine or imprisonment. Williams urges that the Supreme Court's holding in that context that the satisfaction of one alternative punishment nullified the other signifies that her acquittal on one alternative basis for culpability nullifies the other. However, the Supreme Court has not read *Bradley* that broadly even within the context of multiple punishments, much less extended its reach to bar a simultaneous conviction on an alternative basis for culpability. *See, e.g., Jones v. Thomas*, 491 U.S. at 382-85, 109 S.Ct. at 2526-28. At bottom, petitioner has not identified any federal or state court authority both truly on point and contrary to the decision of the Supreme Court of Nevada in this case, and, most importantly, she has failed to carry her burden of showing an unreasonable application of Supreme Court precedent.

an unreasonable application of clearly established federal law.

IT IS THEREFORE ORDERED that Petition [sic] Jessica Williams' Petition for a Writ of Habeas Corpus and Stay of State Proceedings is DENIED. The Clerk of Court shall forthwith enter judgment accordingly in favor of Respondent and against Petitioner Jessica Williams.

DATED: March 1, 2004

/s/ Philip M. Pro
PHILIP M. PRO
Chief United States District Judge

SUPREME COURT OF NEVADA

JESSICA WILLIAMS, APPELLANT, v. THE STATE OF NEVADA, RESPONDENT.

No. 37785

August 2, 2002 50 P.3d 1116

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of driving with a prohibited substance in the blood or urine, one count of use of a controlled substance, and one count of possession of a controlled substance. Eighth Judicial District Court, Clark County; Mark W. Gibbons, Judge.

The supreme court, LEAVITT, J., held that: (1) prohibited substance statute is constitutional, (2) conviction under prohibited substance theory did not violate Double Jeopardy Clause, (3) trial court properly instructed jury on proximate cause, and (4) independent laboratory's failure to refrigerate defendant's blood sample did not violate her due process rights.

Affirmed.

Law Office of John G. Watkins, Las Vegas; Law Office of Ellen J. Bezian, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, and Bruce W. Nelson, Deputy District Attorney, Clark County, for Respondent.

1. CONSTITUTIONAL LAW.

Statutes that involve fundamental rights, such as privacy, or that are based on suspect classifications, such as race, are subject to strict scrutiny in equal protection analysis. Const. art. 4, § 21; U.S. CONST. amend. 14, § 1

2. CONSTITUTIONAL LAW.

Statutes that do not infringe upon fundamental rights nor involve a suspect classification are reviewed using the lowest level of scrutiny in equal protection analysis – rational basis. Under this standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest. Const. Art. 4, § 21; U.S. CONST. amend. 14, § 1.

3. CONSTITUTIONAL LAW.

Legislation affecting the "right" to drive is subject to rational basis standard of review in equal protection analysis. Const. Art. 4, § 21; U.S. CONST. amend. 14, § 1.

4. CONSTITUTIONAL LAW.

All statutes are presumed constitutional and the party attacking the statute has the burden of establishing that the statute is invalid.

5. AUTOMOBILES; CONSTITUTIONAL LAW.

Equal protection clause is not violated by statute making it unlawful for any person to drive or be in physical control of a vehicle with prohibited substance above certain levels in the blood or urine, even though statute treats drivers differently from other individuals and makes a distinction between legal and illegal users of marijuana, because statute is rationally related to State's interest in highway safety and in deterring illicit drug use. Const. Art. 4, § 21; U.S. CONST. amend. 14, § 1; NRS 484.379(3).

6. AUTOMOBILES; CONSTITUTIONAL LAW.

Substantive due process rights are not violated by statute making it unlawful for any person to drive or be in physical control of a vehicle with prohibited

substance above certain levels in the blood or urine. U.S. CONST. amend. 14, § 1; NRS 484.379(3).

7. CRIMINAL LAW.

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that her conduct is forbidden by statute.

8. CRIMINAL LAW.

Although a facial attack may be asserted as to a statute that implicates constitutionally protected conduct, a statute that does not implicate constitutionally protected conduct may be void for vagueness only if it is vague in all of its applications.

9. CONSTITUTIONAL LAW.

The Due Process Clause does not require impossible standards of specificity in penal statutes. Instead, a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute. U.S. CONST. amend. 14.

10. CONSTITUTIONAL LAW.

Statutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality.

11. AUTOMOBILES; CONSTITUTIONAL LAW.

Statute making it unlawful for any person to drive or be in physical control of a vehicle with prohibited substance above certain levels in the blood or urine is not void for vagueness under Due Process Clause. U.S. CONST. amend. 14, § 1; NRS 484.379(3).

12. AUTOMOBILES; CONSTITUTIONAL LAW.

Statute making it unlawful for any person to drive or be in physical control of a vehicle with prohibited substance above certain levels in the blood or urine does not infringe upon First Amendment rights and is thus not overbroad. U.S. CONST. amend. 1; NRS 484.379(3).

13. CONSTITUTIONAL LAW.

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights. U.S. CONST. amend. 1.

14. CONSTITUTIONAL LAW.

An overbreadth challenge may only be made if a statute infringes upon conduct protected by the First Amendment. Absent such infringement, an overbreadth challenge must fail. U.S. CONST. amend. 1.

15. DOUBLE JEOPARDY.

Acquittal of charges of driving under the influence of a controlled substance did not, under Double Jeopardy Clause, preclude conviction of charges of driving with a prohibited substance in the blood; charges constituted alternative means of committing the offense, and defendant was subjected to only one prosecution and one punishment for each charge. U.S. CONST. amend. 5; NRS 173.075(2), 484.3795(1)(d), (f).

16. DOUBLE JEOPARDY.

If the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses. U.S. CONST. amend. 5.

17. AUTOMOBILES.

In prosecution for driving with prohibited substance in the blood or urine, in which defendant claimed that county's purported negligence contributed to fatal accident, jury instruction adequately defined "proximate cause" as "that cause which is natural and a continuous sequence, unbroken by any other intervening causes, that produces the injury and without which the injury would not have occurred," and "that which necessarily sets in operation the factors that accompany the injury."

18. CRIMINAL LAW.

The contributory negligence of another does not exonerate the defendant unless the other's negligence was the sole cause of injury.

19. AUTOMOBILES.

County's alleged negligence in placing teenagers in median of highway was irrelevant in prosecution of motorist for driving with prohibited substance in the blood or urine. County's act was a preexisting condition to defendant's act of veering off road and colliding with teenagers.

20. AUTOMOBILES; CONSTITUTIONAL LAW; CRIMINAL LAW.

Defendant's due process rights were not violated when independent laboratory stored her blood sample in unrefrigerated location without State's knowledge, where defendant did not request retest of her sample for over ten months after it was drawn, jury was permitted to consider evidence relating to original test, retest, delay in retesting, and lack of refrigeration. Defendant failed to show that State acted in bad faith or that exculpatory value of the blood samples was apparent or material to defense at time it was stored. U.S. CONST. amend. 14.

21. AUTOMOBILES; CRIMINAL LAW.

Trial court acted within its discretion in refusing to conduct evidentiary hearing on defendant's motion to suppress during trial when defendant learned that her blood sample had not been stored in refrigeration. Trial court allowed both sides ample time to examine expert witness in presence of jury, and court advised parties that if motion to suppress was renewed post-trial, an evidentiary hearing would then be conducted. NRS 174.125.

Before the Court EN BANC.

OPINION

By the Court, LEAVITT, J.:

In this appeal, appellant Jessica Williams raises several claims of error relating to her conviction and challenges the constitutionality of NRS 484.379(3) on various grounds.

FACTS

On March 19, 2000, while returning to Las Vegas from the Valley of Fire via Interstate 15, Williams drove her van off the road, into the median, and then struck and killed six teenagers. Testimony at trial revealed that Williams had stayed up all night on March 18, 2000. Williams admitted to using marijuana approximately two hours prior to the collision. Williams also admitted to using a designer drug, "ecstasy," on the evening prior to the collision. After the collision, Williams admitted to being the driver of the van. She also voluntarily turned over her marijuana pipe to police. Residue in the pipe was subsequently analyzed and found to be marijuana. Williams was

also found to be in possession of a plastic bag containing a substance that subsequent tests confirmed was marijuana. Williams gave three blood samples for testing purposes, which were subsequently analyzed and found to contain in excess of the proscribed levels of the active ingredient in marijuana and its metabolite.

Williams claimed that she fell asleep at the wheel. Several witnesses testified at trial that they saw Williams' vehicle pass them and then drift to the right. The passenger in Williams' van testified that she awoke when the van drifted into the median, then looked over and saw Williams asleep.

Williams was charged, in part, with six counts of driving while intoxicated and/or driving with a prohibited substance in her bloodstream, six counts of reckless driving, six counts of involuntary manslaughter, one count of possession of a controlled substance, and one count of using a controlled substance. After extensive pretrial motions, including challenges to the constitutionality of the prohibited substance statute, to the form of the indictment, and to Williams' attempts to raise the issue of the county's purported negligence, Williams proceeded to trial. At the conclusion of a two-week trial, the jury was instructed that it could find Williams guilty of either the DUI, the reckless driving, or the involuntary manslaughter charges. As to the DUI charges, the verdict form contained two options for each count – one for driving under the influence and one for driving with a prohibited substance in the bloodstream. The jury was instructed that it could find Williams guilty under either or both DUI theories but that it could not find her guilty of "involuntary manslaughter and reckless [driving] and one or both of the [DUI's]."

Williams was convicted by a jury of six counts of driving with a prohibited substance in the blood or urine, one count of use of a controlled substance, and one count of possession of a controlled substance. The jury returned not guilty verdicts on the six counts of driving while under the influence, six counts of involuntary manslaughter, six counts of reckless driving, and on the single count of being under the influence of a controlled substance. Williams' subsequent motion for a new trial was denied. The judgment of conviction was entered on April 5, 2001, and Williams timely filed this appeal.

DISCUSSION

Williams challenges the constitutionality of NRS 484.379(3) on various grounds. In addition, Williams claims that under the Double Jeopardy Clause, her acquittal of the charges pursuant to NRS 484.3795(1)(d) (driving under the influence of a controlled substance) precluded her conviction of the charges pursuant to NRS 484.3795(1)(f) (driving with a prohibited substance in the blood). Williams also claims: that the district court erred in prohibiting her from raising Clark County's purported negligence as the proximate cause of the deaths; that the failure to refrigerate her blood samples constituted destruction of evidence and violated her right to due process; and that the district court erred in refusing to conduct a suppression hearing on her motion to exclude the blood evidence until after the close of trial. We have considered these, and Williams' other claims of error, and conclude that they lack merit.

A. *Constitutionality of NRS 484.379(3)*

In 1999, the Nevada Legislature enacted NRS 484.379(3), which provides, in pertinent part, that "[i]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway . . . with an amount of a prohibited substance in his blood . . . that is equal to or greater than" two nanograms per milliliter of marijuana or five nanograms per milliliter of marijuana metabolite.[1] The Legislature also added subsection (f) to NRS 484.3795(1).[2] Under that section, a person is guilty of a felony if the person "[h]as a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379" and the person neglects a duty imposed by law while driving that proximately causes the death of or substantial bodily harm to another person.

At a pretrial hearing to consider the constitutionality of the prohibited substance statute, Senator Jon Porter, who initially proposed the legislation, testified that the Legislature intended to create a per se statute similar to the alcohol per se statute. During this hearing, Senator Porter noted that there were twelve different hearings on the bill and that the wording changed during the course of these hearings. The original draft of the bill provided that driving or being in control of a vehicle with "a detectable amount of a controlled substance" constituted a DUI violation.[3] The bill was subsequently amended to include a

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[1] 1999 Nev. Stat., ch. 622, § 23, at 3415-16.

[2] *Id.* § 28, at 3422.

[3] S.B. 481, 70th Leg. (Nev. 1999) (referred to Senate Comm. on Judiciary on March 18, 1999).

short list of controlled substances, which were deemed to be prohibited substances, and if found in a driver's system, would constitute a per se DUI violation.[4] In response to concerns over the absence of a defined level of drugs required for a conviction, the bill was amended, where possible, to include the federal standards set by the Substance Abuse and Mental Health Services Administration ("SAMHSA").[5] SAMHSA is the agency responsible for setting standards for toxicology testing of airline pilots, train engineers, and others who must be tested for drugs under federal law.

Williams challenges the constitutionality of the resulting prohibited substance statute, NRS 484.379(3), on several bases, each of which will be separately addressed.

1. *Equal protection*

[Headnotes, 1, 2]

Williams first contends that NRS 484.379(3) violates the Equal Protection Clause because it impermissibly treats drivers with proscribed levels of drugs in their systems differently from others.[6] In analyzing equal protection challenges, the appropriate level of judicial scrutiny must first be determined by considering the nature of the right being asserted.[7] Statutes which involve fundamental rights (such as privacy) or which are based

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[4] Hearing on S.B. 481 Before the Senate Comm. on Judiciary, 70th Leg., 6 (Nev., April 9, 1999).

[5] Hearing on S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg., 12-15 (Nev., May 5, 1999).

[6] U.S. Const. amend. XIV, § 1; Nev. Const. art. 4, § 21.

[7] *See Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000).

on suspect classifications (such as race) are subject to strict scrutiny.[8] Statutes which do not infringe upon fundamental rights nor involve a suspect classification are reviewed using the lowest level of scrutiny-rational basis.[9] Under the rational basis standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest.[10]

[Headnote 3]

In a footnote in Williams' opening brief, she argues that this court should apply a strict scrutiny standard because the "right" to drive is a fundamental right. In the context of a license revocation proceeding, we have previously held that there is no constitutional right to drive; rather, driving is a privilege.[11] Other courts have similarly held that neither driving nor using illicit drugs constitute fundamental rights.[12] The appropriate level of scrutiny is thus the rational basis standard. During oral argument, Williams' counsel conceded that rational basis is the appropriate standard of review.

[Headnote 4]

All statutes are presumed constitutional and the party attacking the statute has the burden of establishing that

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Zamarripa v. District Court*, 103 Nev. 638, 642, 747 P.2d 1386, 1388 (1987).

[12] *State v. Phillips*, 873 P.2d 706, 709 & n.5 (Ariz. Ct. App. 1994); *see also Shepler v. State*, 758 N.E.2d 966, 969 (Ind. Ct. App. 2001); *People v. Gassman*, 622 N.E.2d 845, 853 (Ill. App. Ct. 1993).

the statute is invalid.[13] The United States Supreme Court has provided the following guidelines in determining the rational basis of a statute:

> [A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*"
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." . . . Finally, courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" "The problems of government are practical ones and may justify . . . rough accommodations – [however] illogical . . . and unscientific [the accommodations may be]."[14]

[Headnote 5]

The State contends that the prohibited substance statute is rationally related to the State's interest in highway safety and in deterring illicit drug use. We agree.

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[13] *Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

[14] *Heller v. Doe*, 509 U.S. 312, 320-21 (citations omitted) (emphasis added).

In passing the prohibited substance statute, the Legislature clearly articulated its intent to follow the lead of nine other states and create a per se drug violation[15] similar to the alcohol per se statute. The Legislature considered extensive testimony before passing the law and rejected the concerns expressed by those opposed to the law, who argued it lacked a direct correlation between the prohibited drugs in a driver's system and impairment. Since the law was passed in 1999, the Legislature in 2001 had an opportunity to amend the statute and did not do so, although other aspects of the DUI statute were amended during the 2001 legislative session.

We have previously recognized traffic safety as a rational basis for upholding statutes that regulate the use of substances that may impair a person's ability to drive.[16] In considering Arizona's per se drug statute, the Arizona Court of Appeals concluded in *State v. Phillips*

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[15] In considering this legislation, the Legislature received information that nine other states had already enacted per se drug statutes. These states included Arizona, Georgia, Illinois, Indiana, Iowa, Minnesota, Rhode Island, South Dakota, and Utah. At the time, statutes in Arizona, Georgia, and Illinois had been challenged and found to be a proper exercise of legislative authority. Since then, Indiana and Iowa have also upheld their per se drug statutes. *Shepler*, 758 N.E.2d at 969; *Loder v. Iowa Dept. of Transp.*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000). Based on another statute providing for medical use of marijuana, Georgia concluded that as to marijuana, the per se drug statute violated the Equal Protection Clause because it treated legal and illegal marijuana users differently without a rational basis. *Love v. State*, 517 S.E.2d 53, 57 (Ga. 1999). However, Georgia has subsequently recognized the validity of the statute as applied to drivers with cocaine in their system. *See Carthon v. State*, 548 S.E.2d 649, 654 (Ga. Ct. App. 2001); *Keenum v. State*, 546 S.E.2d 288, 289 (Ga. Ct. App. 2001).

[16] *Sereika v. State*, 114 Nev. 142, 149, 955 P.2d 175, 180 (1998).

that banning driving by persons with any measurable amount of illicit drugs was constitutional because "the legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great."[17] Likewise, we conclude that the governmental interest in maintaining safe highways is sufficient for our prohibited substance statute to survive a constitutional attack on the basis that it impermissibly treats drivers with the proscribed levels of illicit drugs in their system differently from others.

To the extent that Williams' argument is premised on the distinction made between legal and illegal users of marijuana, we likewise conclude that it lacks merit. This portion of Williams' argument is based on language in NRS 484.1245 that exempts substances used by persons with a valid prescription for that substance from the definition of "prohibited substances" as used in NRS 484.379(3). Williams also points to the exclusion of certain parts of the marijuana plant from the definition of "marijuana" in NRS 453.096 in asserting there could be "legal" users, as well as the fact that doctors in Nevada may prescribe Marinol[18] to certain persons.

The State contends that Nevada did not recognize any lawful users of marijuana at the time of Williams' collision or conviction.[19] In addition, the State contends that even if

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[17] 873 P.2d at 710.

[18] Marinol is a drug containing one of the active ingredients in marijuana.

[19] Though Nevada voters in the 2000 election approved a referendum authorizing the Legislature to draft a medicinal marijuana

(Continued on following page)

such a distinction existed, it would be rationally related to a legitimate state objective in deterring illicit drug use. We agree.

The Legislature could have reasonably determined that illegal use of a substance poses a greater threat to the public – and therefore warrants a harsher punishment – because unlike prescribed use, illegal use of drugs is not controlled. Specifically, a prescription is generally for a drug which has been reviewed and/or approved by the Food and Drug Administration ("FDA"), is of a specific potency, is prescribed at a certain dosage, and is often accompanied by warnings not to drive. Conversely, people who use illicit drugs do so to impair themselves – to obtain a specific effect or desired "high," which arguably makes them more likely to be unable to drive safely. Under *Heller v. Doe*,[20] this or any other reasonably conceivable rationale need not have been actually considered by our Legislature to provide a basis for upholding a statute reviewed under the rational basis test.

We conclude that NRS 484.379(3) is rationally related to a legitimate state objective and is therefore constitutional. In doing so, we reiterate that it is the province of the Legislature to pass legislation, while our duty is to determine whether such legislation passes constitutional scrutiny and is therefore valid law.[21] Opponents of a valid statute must look to the Legislature rather than the judiciary to amend the law.

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statute, the referendum was passed after Williams' collision and such a statute has not yet been enacted.

[20] 509 U.S. at 319-21.

[21] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. *Due process*

[Headnote 6]

Williams next argues that the statute violates her right to substantive due process.[22] In this claim, Williams seems to mimic her equal protection arguments. Williams claims that the State may not deprive her of her right to drive while having "low" levels of marijuana because there is no rational, non-arbitrary connection to a legitimate purpose. In addition, Williams claims that the means utilized by the Legislature to achieve its legitimate purpose are too onerous because there is no legitimate interest in prosecuting unimpaired drivers for DUI. We conclude this argument lacks merit.

As previously discussed, there are several ways in which the statute could be rationally related to legitimate governmental objectives. One plausible rationale suffices even if not considered or articulated by the Legislature.[23] Further, when the constitutionality of a statute is examined using the rational basis standard, the state is not compelled to use the least restrictive means to reach the desired objective.[24] A statute analyzed under this standard must survive a constitutional challenge "even when there is an imperfect fit between means and ends."[25]

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[22] U.S. Const. amend. XIV, § 1.

[23] *Heller*, 509 U.S. at 319-21.

[24] *Id.* at 320-21.

[25] *Id.* at 321.

3. *Vagueness*

Williams claims that the prohibited substance statute is void for vagueness because she cannot tell what part of the marijuana plant or which marijuana metabolites are prohibited or when she has reached the levels proscribed by NRS 484.379(3).

[Headnote 7-10]

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that her conduct is forbidden by statute.[26] While a facial attack may be asserted as to a statute that implicates constitutionally protected conduct, a statute that does not implicate constitutionally protected conduct, as in this instance, may be void for vagueness only if it is vague in all of its applications.[27] The Due Process Clause "'does not require impossible standards of specificity in penal statutes.'"[28] Instead, a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute.[29] Statutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality.[30] Williams thus has the burden of proving that the statute failed to provide adequate notice of the proscribed conduct.

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[26] *United States v. Harriss*, 347 U.S. 612, 617 (1954).

[27] *Martin*, 99 Nev. at 340, 662 P.2d at 637.

[28] *Sheriff v. Vlasak*, 111 Nev. 59, 61, 888 P.2d 441, 443 (1995) (quoting *Wilmeth v. State*, 96 Nev. 403, 405, 610 P.2d 735, 737 (1980) (citations omitted)).

[29] *Id.*

[30] *Id.* at 61-62, 888 P.2d at 443.

In *Phillips*, the Arizona Court of Appeals considered the argument that Arizona's per se drug statute was unconstitutionally vague.[31] The court rejected the claim and held that the statute provided adequate warning of the proscribed conduct because none of the terms utilized in the statute defied common understanding, and interpretation of the statute was not dependent on a third party's judgment.[32] *Phillips* held that a potential offender was therefore on notice that any driver who has ingested a prohibited drug would be subject to prosecution.[33] In *People v. Gassman*,[34] the Illinois Court of Appeals rejected a vagueness challenge to the Illinois per se drug statute for similar reasons. Like the Arizona statute, the Illinois statute prohibits driving with any detectable amount of drugs in the system.[35]

[Headnote 11]

Nevada's prohibited substance statute is even more explicit than the Arizona or Illinois statutes because only ten substances or metabolites are prohibited and the proscribed amount is indicated for both blood and urine levels. In addition, because the statute contains the specific amount of drug that is prohibited, there is even less need to depend on a third party's judgment.

The substance at issue in the present case is marijuana and its metabolite. Although marijuana is not

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[31] 873 P.2d at 708-09.

[32] *Id.* at 709.

[33] *Id.*

[34] *Gassman*, 622 N.E.2d at 853.

[35] *See* 625 Ill. Comp. Stat. Ann. 5/11-501(a)(6) (West Supp. 2002).

defined in NRS Chapter 484, it is defined in NRS 453.096. A metabolite, as defined in an ordinary dictionary, means a "product of metabolism."[36] Considering the plain meaning of the terms, we conclude that a person of ordinary intelligence has adequate notice of the meaning of marijuana, and that marijuana metabolites are those metabolites that result from ingesting marijuana – as defined in NRS 453.096. We note that Williams appears to have clearly understood the common meaning of the term "marijuana." Williams acknowledged being a regular marijuana user and turned over her pipe containing marijuana residue to a police officer at the collision site. She was also found to be in possession of a plastic bag later found to contain marijuana.

Williams' second vagueness claim is that a person cannot tell when he or she will reach the prohibited levels of marijuana. In *Slinkard v. State*, we considered and rejected this same argument with regard to the alcohol per se statute.[37] We determined that a person of average intelligence could reason that consumption of a substantial quantity of alcohol could result in the proscribed level and held that this sufficed to satisfy the notice requirement.[38] In the context of this case, the argument is even weaker because unlike alcohol – which may be legally possessed and consumed – it is unlawful to use or possess marijuana in any amount.[39] Williams was given adequate

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[36] *See Random House Webster's College Dictionary* 823 (2d ed. 1996).

[37] 106 Nev. 393, 395, 793 P.2d 1330, 1331 (1990).

[38] *Id.*

[39] NRS 453.336 (possession of a controlled substance); NRS 453.411 (being under the influence of a controlled substance).

notice that she was not permitted to legally possess or use marijuana, yet she chose to do both and then drive a vehicle. Further, the statute provides adequate notice that it is unlawful to drive with clearly defined levels of marijuana or marijuana metabolite in the bloodstream.

4. *Overbreadth*

[Headnote 12]

Williams' last constitutional challenge is that NRS 484.379(3) fails to recognize the lawful use of the parts of the marijuana plant that are excluded from the definition of marijuana under NRS 453.096(2). Williams argues that this impermissibly punishes the use of all marijuana and that since it captures legal conduct, the statute is overbroad. She also argues that marijuana is not precisely defined in NRS 484.3795.

[Headnotes 13, 14]

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights."[40] An overbreadth challenge may only be made if a statute infringes upon constitutionally protected conduct.[41] Absent such infringement, an overbreadth challenge must fail.[42]

We have already determined that the statute being challenged by Williams does not affect constitutionally

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[40] *Chicago v. Morales*, 527 U.S. 41, 52 (1999) (plurality opinion).

[41] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

[42] *Id.*

protected conduct. Therefore, Williams' overbreadth argument is without merit.

B. *Double jeopardy*

[Headnote 15]

Next, Williams argues that her conviction under the prohibited substance theory violates the Double Jeopardy Clause.[43] Specifically, she claims that since she was charged under two subsections of NRS 484.3795(1), and the district court treated the alternative theories as separate offenses by asking the jury to return verdicts as to each theory, that acquittal under the first theory precluded conviction under the second theory.

"'[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'"[44]

[Headnote 16]

To determine whether a single act which allegedly violates two statutory provisions constitutes a single offense for purposes of double jeopardy analysis, we recently reiterated that the test set forth in *Blockburger v. United States*[45] is the appropriate tool.[46] Under this test, "if

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[43] U.S. Const. amend. V.

[44] *Gordon v. District Court*, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996) (quoting *United States v. Halper*, 490 U.S. 435, 440 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997)).

[45] 284 U.S. 299 (1932).

the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."[47] Here, NRS 484.3795(1)(d) makes it unlawful to drive or be in actual physical control of a vehicle while "under the influence of a controlled substance." NRS 484.3795(1)(f) prohibits a person from driving or being in actual physical control of a vehicle while having a prohibited substance in his or her blood in excess of the amount set forth in NRS 484.379(3). Impairment is not necessary for a conviction under NRS 484.3795(1)(f); and, unlike NRS 484.3795(1)(f), no specific level of a prohibited substance must be found in order to convict a person under NRS 484.3795(1)(d). In addition, we previously recognized the existence of a per se violation, in the alcohol context, and stated that "[t]his violation exists completely apart from a violation based on being under the influence of intoxicating liquor or a controlled substance."[48] Under the *Blockburger* test, each

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[46] *Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001).

[47] *Id.*

[48] *Long v. State*, 109 Nev. 523, 530, 853 P.2d 112, 116 (1993); *see also State v. Dow*, 806 P.2d 402, 405-07 (Haw. 1991) (holding that Hawaii's DUI statute "provides two alternative means of proving a single offense" and that trying a defendant on a per se DUI theory, after she had been "acquitted" of the impairment theory, did not constitute double jeopardy because "acquittal" on one theory was not fatal to completely separate theory); *State v. Abbott*, 514 P.2d 355 (Or. Ct. App. 1973) (holding that there was no prohibition against convicting a defendant of a per se violation while simultaneously acquitting a defendant of driving under the influence); *State v. Superior Court of Pima County*, 721 P.2d 676 (Ariz. Ct. App. 1986) (explaining that per se violation and driving under the influence involve different factual elements).

of these subsections defines a separate offense for purposes of double jeopardy analysis.

We previously concluded that multiple convictions under separate DUI theories are impermissibly redundant.[49] In *Dossey v. State*,[50] the driver was charged and convicted of three counts of driving while intoxicated, each brought under a different subsection of NRS 484.379(1). We concluded "that the [L]egislature intended the subsections of [the DUI] statute to define alternative means of committing a single offense, not separable offenses permitting a conviction of multiple counts based on a single act."[51] Accordingly, using the redundant conviction analysis, we vacated the conviction on two of the counts as redundant but affirmed the conviction and sentence as to the third count.

Under NRS 173.075(2), alternative means of committing a crime may be alleged within a single count. We previously have held that although a charging document may set forth alternative means of committing an offense within a single count, alternative offenses must be charged in separate counts.[52] Further, setting forth alternative and distinct theories of prosecution in one count does not fail to give the defendant adequate notice of the charges against

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[49] *Dossey v. State*, 114 Nev. 904, 964 P.2d 782 (1998); *see also Albitre v. State*, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987) (holding that "redundant convictions that do not comport with legislative intent" should be stricken).

[50] 114 Nev. at 904, 964 P.2d at 782.

[51] *Id.* at 909, 964 P.2d at 785.

[52] *Jenkins v. District Court*, 109 Nev. 337, 339-40, 849 P.2d 1055, 1057 (1993).

him.[83] Based on our decision in *Dossey*, the State properly alleged alternative theories in one count. The purpose of NRS 173.075 is clearly to ensure that the defendant is given proper notice of the charges he is faced with so as to adequately defend against them. The record here indicates that Williams was clearly on notice as to the charges she faced.

We conclude that NRS 484.3795(1)(d) and (f) constitute alternative means of committing an offense and that appellant's acquittal under the one subsection and her conviction under the other does not violate the Double Jeopardy Clause. Further, we conclude that Williams' argument also lacks merit because she has been subjected to only one prosecution and one punishment for each DUI charge.

C. *Proximate cause*

Williams claims that the trial court erred in excluding evidence of the county's purported negligence because that decision improperly shifted the burden of proof to the defense on the issue of proximate cause. We disagree.

[Headnote 17, 18]

The State's motion in limine to exclude this evidence was granted on the basis that any purported negligence by a third party would not exculpate Williams if she was found to be a proximate cause of the deaths. Proximate cause was defined in Jury Instruction No. 15, which stated:

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[83] *Sheriff v. Aesoph*, 100 Nev. 477, 478, 686 P.2d 237, 238 (1984).

> "Proximate Cause" is that cause which is natural and a continuous sequence, unbroken by any other intervening causes, that produces the injury and without which the injury would not have occurred.
>
> A proximate cause of an injury can be said to be that which necessarily sets in operation the factors that accomplish the injury.
>
> The contributory negligence of another does not exonerate the defendant unless the other's negligence was the sole cause of injury.

We have previously held that a similar instruction "was an accurate statement of Nevada law" because an intervening cause must be a "superseding cause" or the "sole cause" in order to completely excuse the prior act.[54] We conclude that the instruction given in this case was also proper.

[Headnote 19]

Further, we conclude that the district court did not abuse its discretion by excluding the evidence as irrelevant.[55] Our point is illustrated by a California case involving similar facts. In *People v. Autry*,[56] the California Court of Appeals considered the question of whether alleged negligence by a construction company in placing work

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[54] *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991).

[55] NRS 48.025 provides that only relevant evidence is admissible. The determination of whether evidence is relevant lies within the sound discretion of the trial judge. *Atkins v. State*, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996). That decision will not be disturbed on appeal "absent a clear abuse of that discretion." *Id.*

[56] 43 Cal.Rptr.2d 135, 137 (Ct. App. 1995).

crews in the median without the required attenuator truck behind the workers to absorb any collisions and prevent injuries to the workers relieved a defendant of criminal liability. There, as in this case, the defendant was charged with driving under the influence and second-degree murder based on the deaths that resulted from the collision with the workers.[57] The court found as a matter of law that the construction company's alleged negligence was a preexisting condition and therefore could not be an intervening or superseding cause.[58] The court reasoned that "[i]n the normal meaning of the words, . . . an 'intervening' or 'superseding' cause which relieves the criminal actor of responsibility is one which 'breaks the chain of causation' *after* the defendant's *original* act."[59]

Likewise, in the present case, the county's placement of the teenagers in the median was a preexisting condition to Williams' act of veering off the road and colliding with the teenagers in the median. The district court thus properly held that any purported negligence would not exonerate Williams and properly rejected the evidence as irrelevant.

We conclude that the district court properly exercised its discretion in concluding that evidence of the county's purported negligence was irrelevant because such negligence could not exculpate Williams. This decision did not shift the burden of proof because the State was still required to prove beyond a reasonable doubt that Williams was the proximate cause of the resulting deaths.

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[57] *Id.* at 136.

[58] *Id.* at 140.

[59] *Id.*

D. *Destruction of evidence*

Williams next contends that her conviction should be vacated because the State failed to preserve her blood sample. Williams raised this argument in a motion to suppress the blood evidence and also claims that the district court committed plain error in refusing to conduct a suppression hearing until the close of trial.

1. *Suppression of evidence*

In *Arizona v. Youngblood*,[60] the United States Supreme Court held that the state's failure to preserve evidence does not warrant dismissal unless the defendant can show bad faith by the government and prejudice from the loss of the loss of the evidence.[61] We have reached a similar conclusion:

> [T]he State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed. Where there is no bad faith, the defendant has the burden of showing prejudice. The defendant must show that "'it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense.'" It is not sufficient to show "'merely a hoped-for conclusion'" or "'that examination of

[60] 488 U.S. 51 (1988).

[61] *Id.* at 57-58.

> the evidence would be helpful in preparing [a] defense.'"[62]

Additionally, in *State v. Hall*, we held that a lab's routine destruction of a DUI defendant's blood sample, after a year, did not constitute bad faith.[63]

[Headnote 20]

Here, the blood evidence was not lost or destroyed by the State. Instead, without the State's knowledge, the blood sample was stored by an independent lab (APL) in an unrefrigerated location – according to the lab's normal procedures. Williams did not request a retest of her blood sample for over ten months after it was drawn. Upon request, the State stipulated to allow the retest and there is no evidence that the State delayed the request in any way.

The district court concluded that Williams had failed to show that the State acted in bad faith or that the exculpatory value of the blood samples was apparent or material to her defense at the time that it was stored at room temperature. Nevada case law, as clearly articulated in *Leonard v. State*,[64] supports this conclusion. Williams has failed to demonstrate how this decision was erroneous.

Accordingly, we conclude that the district court properly determined that Williams failed to show the non-refrigeration constituted a due process violation. We also concur with the district court's decision to allow the jury to

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[62] *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (citations omitted).

[63] 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

[64] 117 Nev. 53, 17 P.3d 397.

consider all of the evidence relating to the original test, the retest, the delay in retesting, and the lack of refrigeration. The jury was free to weigh the evidence as it deemed appropriate.

2. *Delay in suppression hearing*

[Headnote 21]

Williams claims that the trial court's refusal to conduct an evidentiary hearing on her motion to suppress the blood evidence until after the close of trial was plain error.

The fact that Williams' blood samples had not been refrigerated did not become known until near the end of the presentation of evidence phase, when Williams sought to introduce the retest results and the testimony of an expert witness not previously disclosed to the State. The State had introduced the blood evidence and the lab analyst's testimony, without objection, six days before this information became known. When this new information arose, the district court recognized that this information was new to all parties and considered the motion to suppress but denied it, without prejudice, on the basis that given the stage of the proceedings, it was not timely.

The district court allowed counsel on both sides to examine the expert offered by Williams outside the presence of the jury. After hearing the testimony, the district court ruled that it would allow both sides ample time to examine the witness in the presence of the jury and would allow both sides to elicit testimony as to how the blood evidence would have been affected by the delay in retesting and by having been stored at room temperature. The district court also advised the parties that if the motion to

suppress was renewed post-trial, an evidentiary hearing would then be conducted.

NRS 174.125(1) provides that motions to suppress evidence must be made before trial, unless the moving party was unaware of the grounds for the motion before trial. NRS 174.125(3)(a) requires that motions to suppress "must be made in writing not less than 15 days before the date set for trial" except in certain circumstances not present in this case. NRS 174.125(3)(b) allows the district court to permit the motion to be filed at a later date "if a defendant waives hearing on the motion or for other good cause shown."

Here, Williams was unaware of the grounds for filing the motion before trial. The district court could have thus considered the motion during trial under NRS 174.125(3)(b). However, the terms in the statute are discretionary and the decision to consider the motion was therefore within the discretion of the district court. The district court considered the motion but refused to stop the proceedings in order to immediately conduct an evidentiary hearing. We conclude that this decision was within the district court's discretion.

E. *Other claims of error*

Williams further claims that the district court erred in admitting the testimony of the lab analyst who handled the blood sample, though Williams did not object or cross-examine the witness. In addition, Williams contends that the district court erred by prohibiting her attorney from talking about an unrelated case, in refusing a proffered jury instruction, and in admitting photographs of the victims taken at the scene of the collision.

These arguments were fully briefed. We have considered them and conclude that they too lack merit.

Accordingly, we order the judgment of conviction affirmed.

MAUPIN, C.J., AND YOUNG, SHEARING, AGOSTI, ROSE and BECKER, JJ., concur.

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DISTRICT COURT
CLARK COUNTY, NEVADA

JESSICA WILLIAMS, Petitioner,	)	
vs.	)	CASE NO.: C189090
	)	DEPT. NO.: XI
STATE OF NEVADA, Respondent.	)	

ORDER GRANTING WRIT OF HABEAS CORPUS (POST CONVICTION); FINDING OF FACTS AND CONCLUSIONS OF LAW

(Filed Mar. 3, 2003)

PETITIONER'S Writ of Habeas Corpus (Post Conviction) having come on for hearing February 11, 2003 at 9:00 AM and continued to February 25, 2003, at the hour of 10:30 AM, this Court, having read the submitted briefs and heard oral arguments, Good Cause appearing:

THE COURT FINDS that the State prosecuted Petitioner Williams on two alternative theories under

the "prohibited substance" section of NRS 484.3795: 1. Marijuana (Tetrahydrocannabinol) and 2. Marijuana metabolite (Carboxylic Acid.) The Jury returned general verdicts of guilty, thus it is unknown which theory, tetrahydrocannabinol or carboxylic acid, was used as a basis for Petitioner Williams' convictions.

THE COURT FURTHER FINDS that the Board of Pharmacy has classified other metabolites by specifically listing them in the Schedules. (For example, the metabolite of cocaine is Benzolyecgonine and it is listed in Schedule II, subpart 2(b).)

THE COURT FURTHER FINDS that the Board of Pharmacy does not list carboxylic acid in Schedule I (NAC 453.510) or Schedule II (NAC 453.520). Also, the State conceded that carboxylic acid was not specifically listed in the Drug Schedules.

THE COURT FURTHER FINDS that tetrahydrocannabinol is listed in Schedule I, thus according to NRS 484.1245 tetrahydrocannabinol is a "prohibited substance." The marijuana metabolite, carboxylic acid is not listed in Schedule I or II; therefore, carboxylic acid is not a "prohibited substance" under NRS 484.1245 or NRS 484.379(3).

CONCLUSIONS OF LAW

THE COURT HOLDS that "No conduct constitutes a crime unless prohibited by some statute of this state. . . ." NRS 193.050(1).

THE COURT FURTHER HOLDS that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution for

the State to use lawful conduct as a basis to convict. When a case has been submitted to a jury on alternative theories and one of the theories is unconstitutional, the verdict must be set aside. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532 (1969). The State does not challenge the holdings of *Griffin* and *Leary*.

THE COURT FURTHER HOLDS that carboxylic acid, a marijuana metabolite, is not listed in Schedule I or II; therefore, carboxylic acid is not a prohibited substance as defined in NRS 484.1245.

THE COURT FURTHER HOLDS that since carboxylic acid is not classified in Schedule I or II, it does not come within the definition of a "prohibited substance," thus its use was an unconstitutional theory of prosecution. *See Griffin* at 59 (" . . . or fails to come within the statutory definition of the crime.")

THE COURT FURTHER HOLDS that the definition of marijuana set forth in NRS 453.096 cannot be used to bootstrap carboxylic acid into becoming a "prohibited substance" under NRS 484.1245 for several reasons. The definition of a controlled substance must be contained in the Schedule itself. The Court said in *Sheriff, Clark County v. Lugman*, 101 Nev. 149, 697 P.2d 107 (1985), "Therefore, it is apparent when reading the UCSA that if one desires to determine whether a particular drug is defined as a controlled substance, he or she **need only check the pharmacy board regulations**." (emphasis added.) *Id.* at 156. A review of Schedule I shows that marijuana metabolite is not defined. *See again, Lugman, supra*. Further, the word "derivative" used in NRS 453.096 is contradictory. Carboxylic acid would be illegal under

Section 1 of NRS 453.096 and not illegal under Section 2 of NRS 453.096. Contradictions must be construed in favor of the Petitioner. *Lugman, supra*, said, "It is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id.* at 155.

THE COURT FURTHER HOLDS that since the word "marijuana" as listed in Schedule I is not properly defined, its meaning as to a particular substance is pure guesswork, Such speculation does not satisfy the constitutional requirement of notice under the Sixth and Fourteenth Amendments of the United States Constitution. The Court in *Whitney v. State, Employment Security Dep't*, 105 Nev. 810, 813, 783 P.2d 459 (1989) said,

> In addition, Whitney could not be considered "self-employed," **because self-employment is undefined**. Basic concepts of fairness and due process require that one who is charged with a wrongdoing be put on notice as to what conduct constitutes the wrong. U.S. Const. amend. XIV; Nev. Const. art. I, § 8; Eaves v. Bd. of Clark County Comm'rs, 96 Nev. 921, 923, 620 P.2d 1248, 1249-50 (1980). (emphasis added.)

THE COURT FURTHER HOLDS that since the case was submitted to the Jury on alternative theories, one theory, carboxylic acid, being unconstitutional, *Griffin* and *Leary* mandates [sic] reversal.

THE COURT ORDERS that the conviction under Counts I through VI inclusive of the Indictment, Case NO. C166483, are reversed.

DATED this 3 day of March, 2003.

/s/ Michael Douglas
DISTRICT COURT
JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JESSICA WILLIAMS, #01534178 Defendant.	)	Case No. C166483 Dept. No. VII

JUDGMENT OF CONVICTION (JURY TRIAL)
(Filed Apr. 6, 2001)

The Defendant previously entered plea(s) of not guilty to the crime(s) of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE AND/OR WITH A PROHIBITED SUBSTANCE IN BLOOD OR URINE (Felony); RECKLESS DRIVING (Felony); INVOLUNTARY MANSLAUGHTER (Felony); POSSESSION OF CONTROLLED SUBSTANCE (Felony); and UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE (Felony); in violation of NRS 484.3795, 484.377, 200.070, 453.336, 453.411, and the matter having been tried before

a jury and the Defendant being represented by counsel and having been found guilty of the crime(s) of COUNT I – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF SCOTT GARNER, JR. (FELONY); COUNT II – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF ALBERTO PUIG (FELONY); COUNT III – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF ANTHONY SMITH (FELONY); COUNT IV – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF REBECCAH GLICKEN (FELONY); COUNT V – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF MALINA STOLTZFUS (FELONY); COUNT VI – DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL WITH A PROHIBITED SUBSTANCE IN BLOOD RESULTING IN THE DEATH OF JENNIFER BOOTH (FELONY); COUNT XIX – USE OF A CONTROLLED SUBSTANCE (FELONY); and COUNT XX – POSSESSION OF CONTROLLED SUBSTANCE (FELONY); and thereafter on the 30th day of March, 2001, the Defendant was present in Court for sentencing with her counsel, JOHN G. WATKINS, ESQ.; and good cause appearing therefor,

THE DEFENDANT HEREBY ADJUDGED, guilty of the crime(s) as set forth in the jury's verdict and, in addition to the $25 Administrative Assessment fee, a $60

Drug Analysis fee, a mandatory $12,000.00 FINE ($2,000.00 per DUI count), $48,300.00 RESTITUTION, and mandatory attendance of a victim impact panel, DEFENDANT WILLIAMS SENTENCED to the Nevada Department of Prisons as to: COUNT I – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of, THIRTY-SIX (36) MONTHS; COUNT II – a MAXIMUM term of NINETY-SIX (96 MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT I; COUNT III – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT II; COUNT IV – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36); CONSECUTIVE to COUNT III; COUNT V – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT IV; COUNT VI – a MAXIMUM term of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS; CONSECUTIVE to COUNT V; COUNT XIX – a MAXIMUM term of THIRTY-FOUR (34) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS; SUSPENDED; placed on PROBATION for an indeterminate period not to exceed TWO (2) YEARS (as to Count XIX ONLY), CONCURRENT with COUNT VI; COUNT XX – a MAXIMUM term, of THIRTY-SIX (36) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS; SUSPENDED; placed on PROBATION for an indeterminate period not to exceed TWO (2) YEARS (as to Count XX ONLY), CONCURRENT with COUNT XIX. Defendant given credit for 376 days served.

DATED this 5 day of April, 2001

/s/ Mark Gibbons
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA WILLIAMS, Petitioner-Appellant, v. WARDEN, for the State of Nevada Women's correctional Facility, Christine Bodo, et al., Respondent-Appellee.	No. 04-15465 D.C. No. CV-03-0874-PMP District of Nevada, Las Vegas ORDER (Filed Oct. 14, 2005)

Before: D.W. NELSON, W. FLETCHER, and FISHER, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges W. Fletcher and Fisher voted to deny the petition for rehearing en banc. Judge D. Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.

Nevada Revised Statutes

484.379. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Unlawful acts; affirmative defense.

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under

the laws of this state is not a defense against any charge of violating this subsection.

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

	Prohibited substance	Urine Nanograms per milliliter	Blood Nanograms per milliliter
(a)	Amphetamine	500	100
(b)	Cocaine	150	50
(c)	Cocaine metabolite	150	50
(d)	Heroin	2,000	50
(e)	Heroin metabolite:		
	(1) Morphine	2,000	50
	(2) 6-monoacetyl morphine	10	10
(f)	Lysergic acid diethylamide	25	10
(g)	Marihuana	10	2
(h)	Marihuana metabolite	15	5
(i)	Methamphetamine	500	100
(j)	Phencyclidine	25	10

4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or

hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

484.3795. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Penalty if death or substantial bodily harm results; segregation of offender; plea bargaining prohibited; affirmative defense; aggravating factor.

1. A person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath;

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath;

(d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;

(e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle; or

(f) Has a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379, and does any act or neglects any duty

imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5,000. A person so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. A prosecuting attorney shall not dismiss a charge of violating the provisions of subsection 1 in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial. A sentence imposed pursuant to subsection 1 may not be suspended nor may probation be granted.

3. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file

and serve on the prosecuting attorney a written notice of that intent.

4. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.